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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 414

CHATTANOOGA BAKERY, INC., PETITIONER,

VS.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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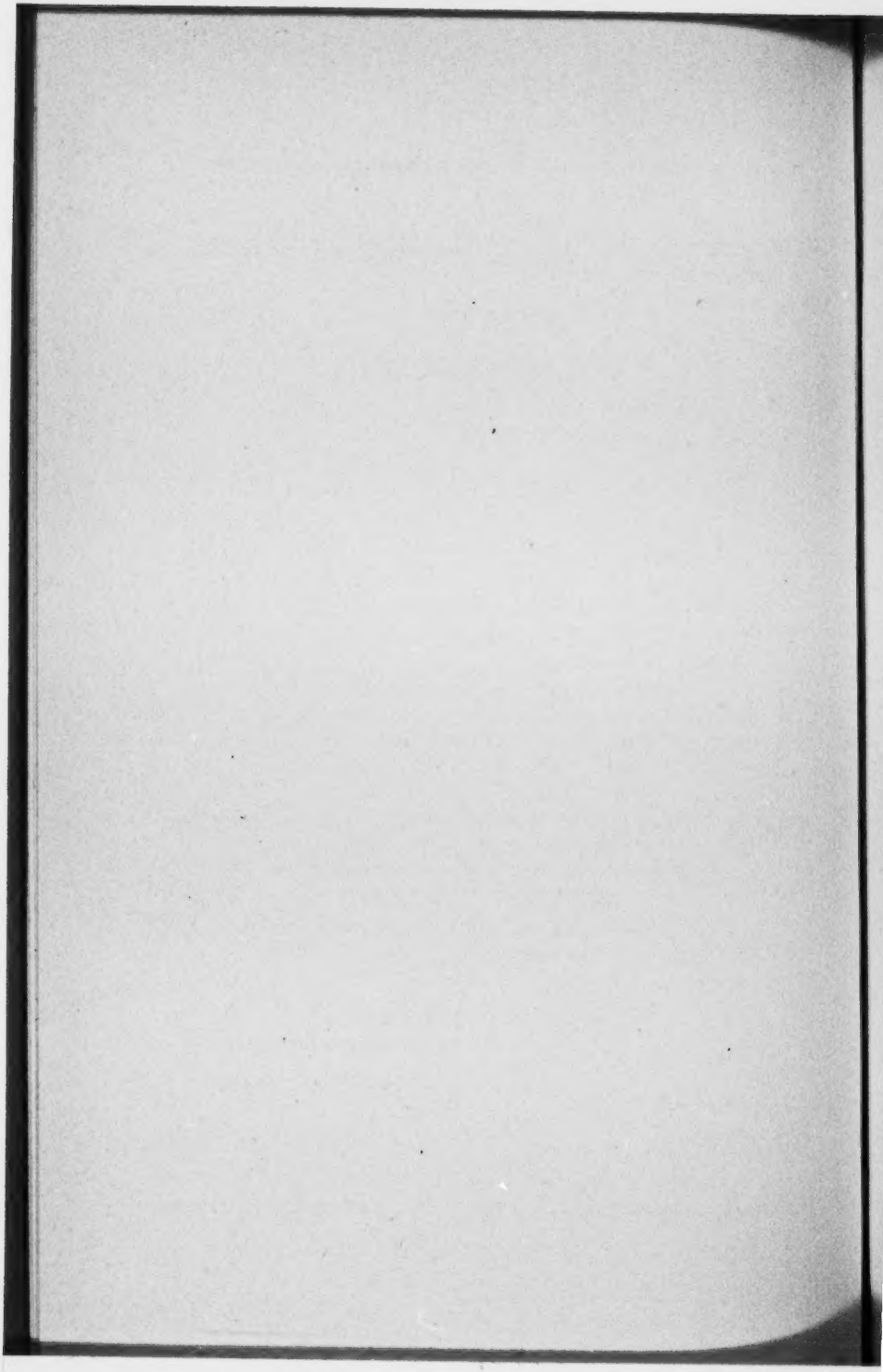

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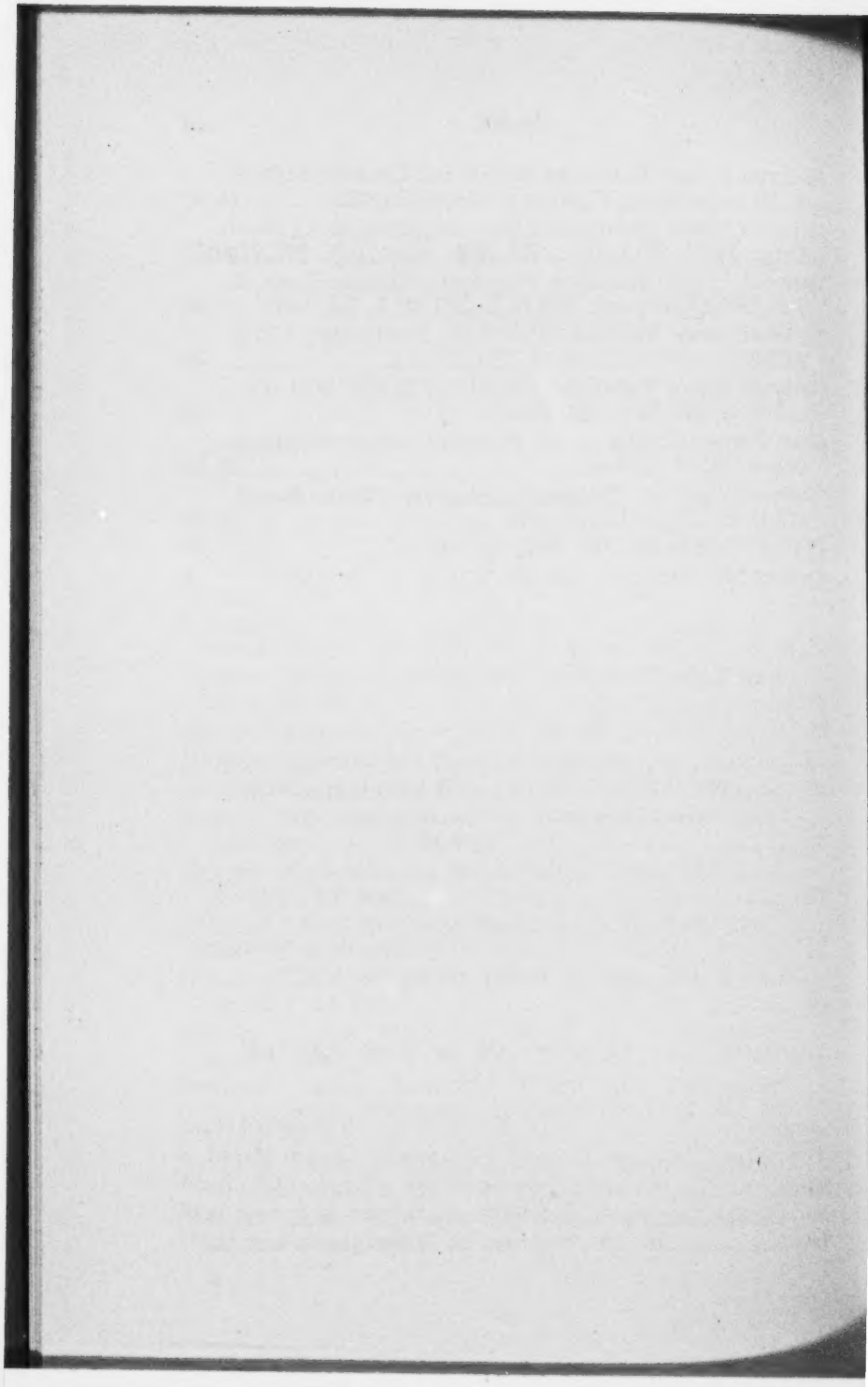

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NATIONAL LABOR RELATIONS BOARD, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

MAY IT PLEASE THE COURT:

The petitioner, Chattanooga Bakery, Inc., a corporation, respectfully shows to this Honorable Court:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Petitioner Chattanooga Bakery, Inc., is a corporation organized under the laws of Tennessee. It purchased a bakery in Chattanooga, Tennessee, on July 1, 1939, from Mountain City Mill Company. Petitioner is a new corporation which had never previously engaged in any busi-

ness. During prior ownership and more than a year before petitioner's purchase, the Mill Company had experienced labor difficulties resulting in a strike which was settled by an open shop union agreement which expressly recognized the fact that the bakery was in liquidation and provided that in the event of the sale of the bakery property the union contract should terminate (R. 950; Board's Exhibit No. 4).

It is conceded that the sale of the property was not caused by a desire to eliminate the union but was dictated by business conditions due to continuous losses in the operation of the bakery (R. 33).

At the time of petitioner's purchase there were 107 nonsupervisory employees working in the bakery. Approximately fifty-five or fifty-six were members of the union whose contract expired upon the sale. In selecting its new force for the operation of the bakery the petitioner employed twenty-nine individuals who were active members of the union, including its President and Secretary and two of the three members of the union grievance committee, but failed to employ twenty-six who were members of the union (R. 33, 393, 303).

Because of petitioner's failure to hire all of the employees of the former owner who were union members, a strike was called and fifteen union members who were hired by petitioner voluntarily quit their jobs.

In a proceeding instituted before the National Labor Relations Board the Board found that the Mill Company, *the previous owner,* had been guilty of unfair labor practices in connection with the strike which occurred in the bakery during the previous ownership, and more than a year prior to petitioner's organization and purchase of the bakery. The Board's finding with respect to these matters was limited to the previous owner and had no application to the petitioner, Chattanooga Bakery, Inc. (R. 29).

The Board further found, however, that petitioner had discriminated against those individuals who were not

employed but admitted that the evidence showed that the affirmative reasons advanced by petitioner for declining such employment had "some foundation in fact in several cases" (R. 70). However it reached the conclusion that such rejection was based in part upon union activities and union membership. The evidence relied on by the Board in support of this finding of discrimination consisted of unsubstantial minor events occurring after July 1, 1939, and *after* petitioner's purchase of the bakery (R. 33-35, 66). Upon this finding the Board, among other things, ordered reinstatement with back pay of all of those applicants who were not hired by the petitioner and those who were hired and who left their employment because of the failure of petitioner to hire the others.

The Board filed this enforcement proceeding in the United States Circuit Court of Appeals for the Sixth Circuit and enforcement was resisted upon the ground, among others, that the Board's conclusions were based upon no substantial evidence and were in reality mere surmise, conjecture and suspicion.

The United States Circuit Court of Appeals for the Sixth Circuit by a divided court directed enforcement of the Board's order, predicating its conclusions upon a finding of substantial evidence to support the Board's order based upon events and occurrences which occurred during prior ownership and more than a year before the purchase of the bakery by petitioner.

National Labor Relations Board v. *Chattanooga Bakery, Inc.*, 127 F. 2d 201.

The evidence set out in the majority opinion of the United States Circuit Court of Appeals for the Sixth Circuit as a basis for support of the Board's finding against petitioner may be briefly summarized as follows:

(a) In 1933, more than a year prior to petitioner's purchase of the properties, Richard Bean, Vice President of Mountain City Mill Company (who was never employed by petitioner), manifested hostility to the union, which

afterwards made a contract with the Mountain City Mill Company, and either Hutcheson or Bean (neither of whom was ever employed by petitioner) had threatened to shut the bakery down and sell it out if the union didn't leave them alone. The Board found as a fact, however, that:

> "While the anti-union statements of the Mill Company officers and agents, heretofore discussed, reflect the respondent's dis-satisfaction with and hostility toward the Union, the Mill Company's substantial losses over a period of years, its efforts to effect a sale of the business antedating the advent of the Union, and the ultimate passage of control of the business to new interests persuade us that the sale and liquidation was not caused by a desire to eliminate the Union but was dictated by business considerations. We are of the opinion that the proof sustains the Mill Company's position and so find. Accordingly, we will dismiss those allegations of the amended complaint."
> (R. 33).

(b) Superintendent Shauf, during his *previous* employment with Mountain City Mill Company, stated in substance that as soon as the union contract terminated Mountain City Mill Company would try to work up something for its own benefit, and also stated to an employee of the Mountain City Mill Company that the Mill Company was going to get the union out of the shop one way or another. Shauf was not an employee of the petitioner at the time these statements were made. The incidents took place more than a year prior to the purchase of the property by petitioner. His statements expressly related to the Mountain City Mill Company. The Board found as a fact that Mountain City Mill Company made no effort to do any of these things and *absolved* the Mountain City Mill Company from the amended charge and dismissed the complaint with respect to it (R. 33, 89, 92).

Nevertheless, the United States Circuit Court of Appeals by the majority opinion regarded these statements as substantial testimony sufficient to enforce the Board's

finding of discrimination against petitioner simply because it employed Shauf *more than a year later* and instructed him to make a selection of personnel on the basis of individual merit, ability, physical fitness, character and educational background.

(c) Forelady Vondrake, in 1938, while employed by Mountain City Mill Company, urged a striking employee of Mountain City Mill Company to leave the union and abandon the strike, and told another employee of Mountain City Mill Company—*more than a year before petitioner purchased the properties*—that she ought to get herself kicked for joining the union. Both the Board and the Court found as a fact that the applicants in question were rejected by a committee composed of Shauf, Parks and Johnson. Vondrake was not a member of the hiring committee and had nothing to do with the selection of the employees of petitioner and, of course, had nothing to do with any alleged discrimination in their selection.

The *only incident* found by either the Board or the majority opinion of the United States Circuit Court of Appeals to have occurred *after* petitioner had purchased the property and hired its supervisory force was a conversation between foreman Cleary and employee, Julia Mazerole, on July 7 or 8, 1939, to the effect that she would have to choose between attending the union meeting and working for the Bakery. It is conceded that Foreman Cleary had absolutely nothing to do with the selection of petitioner's employees or with the failure to hire the twenty-seven applicants who were rejected. He was desperately ill during the trial and died shortly thereafter. Moreover, this conversation occurred after the personnel committee *had employed* Julia Mazerole notwithstanding her union membership. It is undisputed that she was not discharged by petitioner after being so employed but by her own admission she continued to work for petitioner until she voluntarily quit (R. 735).

The remaining evidence referred to in the majority opinion of the court was the circumstance that Superintendent Shauf had possession of a list of all of the employees of the Mill Company who were members of the union. But Circuit Judge McAllister followed this statement with the frank admission that the proof further showed that the list in question had been furnished to Superintendent Shauf by the National Labor Relations Board itself in order to enable the Mill Company to comply with the terms of its union contract in filling vacancies.

In the proceeding before the National Labor Relations Board affirmative evidence was introduced disclosing the precise reason for petitioner's failure to hire the applicants in question. In practically every instance the applicant in question upon cross examination *admitted the truth* of this testimony. The United States Circuit Court of Appeals declined to consider this undisputed testimony although conceding that:

> "In certain instances these claims appear credible and persuasive."

This Court may test the soundness of this statement by referring to the testimony of Media Louise Bragg, one of the rejected applicants. It was claimed that Miss Bragg was not selected to work for the petitioner because she had a peculiar disposition and other employees found it hard to get along with her, which was illustrated by the fact that she had a sister who worked in the plant and to whom she had not spoken for years (R. 401, 532-535).

This applicant admitted in her testimony that she had had arguments with other employees during working hours in the plant (R. 665). She further admitted that she and her sister who worked in the plant were not on speaking terms and that when anyone tried to give her instructions she had had arguments (R. 666). She testified af-

firmatively that she had not spoken to her sister for years, saying:

> "I would have spoke to her if she spoke to me but unless she spoke to me I wouldn't speak to her."
>
> (R. 668.)

Notwithstanding this undisputed affirmative testimony petitioner has been ordered by the court to employ Media Louise Bragg with back pay upon the theory that the Board's finding of discrimination against her was supported by substantial evidence consisting of isolated events which occurred more than a year prior to the purchase of the bakery and in which neither the petitioner nor Media Louise Bragg participated.

Applicant Bragg's testimony is cited merely as an illustration. *The same situation exists with respect to every other applicant who was rejected.*

The record discloses that petitioner's entire capital consists of $25,000. Under the court's decree it has been ordered to pay penalties in the form of back wages to applicants who were never at any time employed by the petitioner aggregating many times petitioner's total assets. This, of course, means the immediate and complete dissolution of petitioner's business with consequent unemployment for approximately 150 people presently employed. Petitioner's assets are hardly sufficient to pay present creditors and lien holder. Its physical assets are covered by a mortgage exceeding the value of its properties. Petitioner is producing food in a highly specialized defense area occupied by United States troops. The consequent destruction of its business means the loss of this food production and the loss of revenue to the United States Government. Nothing will remain for stockholders and little, if anything, will be available for distribution among the rejected applicants and striking employees, practically all of whom have sought and obtained employment elsewhere.

All of this rests entirely upon the conclusion that animosities shown to exist between the previous corporate owner and its employees more than a year prior to the birth of petitioner corporation and its purchase of the bakery are imputable as a matter of law to this petitioner and constitute substantial evidence against this petitioner sufficient to justify from a legal standpoint its complete extinction.

REASONS RELIED UPON FOR THE ISSUANCE OF THE WRIT.

(1) The decision of the United States Circuit Court of Appeals for the Sixth Circuit in the instant case in holding that events occurring between the previous owner and its employees more than a year prior to the purchase of the bakery by petitioner reflecting union animosities constitute substantial evidence to support findings against this petitioner with respect to the failure to hire applicants never previously employed by the petitioner is a clear denial to the petitioner of the due process of law guaranteed by the Fifth Amendment to the Constitution of the United States and is contrary to the principles announced by this Court in *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197, and *National Labor Relations Board* v. *Columbian Enameling & Stamping Co.,* 306 U. S. 392.

(2) The decision of the United States Circuit Court of Appeals for the Sixth Circuit in the instant case in imputing to a subsequent purchaser the legal effect of events occurring during the operation of the bakery by the prior owner with respect to employees subsequently hired by the purchaser, involves an important question of Federal law which has not been but should be settled by this Court.

(3) The decision of the United States Circuit Court of Appeals for the Sixth Circuit in the instant case is

manifestly erroneous since it is predicated upon evidence which no reasonable mind would accept as adequate to support its conclusions and such evidence therefore affords no substantial basis of fact from which the fact in issue could be reasonably inferred.

(4) In the decision in this cause the United States Circuit Court of Appeals for the Sixth Circuit so far departed from the accepted and usual course of judicial proceedings by predicating its finding of substantial evidence upon events occurring more than a year prior to the purchase of the bakery by petitioner and to which petitioner was not a party and attributed the legal effect of such events to the petitioner as to call for the exercise of this Court's power of supervision.

Your petitioner annexes hereto and presents herewith as a part of this petition a certified copy of the entire record in this cause in the United States Circuit Court of Appeals for the Sixth Circuit, specification of error, and brief and argument, giving in more amplified form the reasons why the decision and judgment of the Circuit Court of Appeals for the Sixth Circuit was erroneous and should be reversed, and respectfully asks that the certified copy of the record, specification of error, brief and argument be considered in connection with and as a part of this petition for the purpose of testing the correctness of the ruling of the Circuit Court of Appeals for the Sixth Circuit.

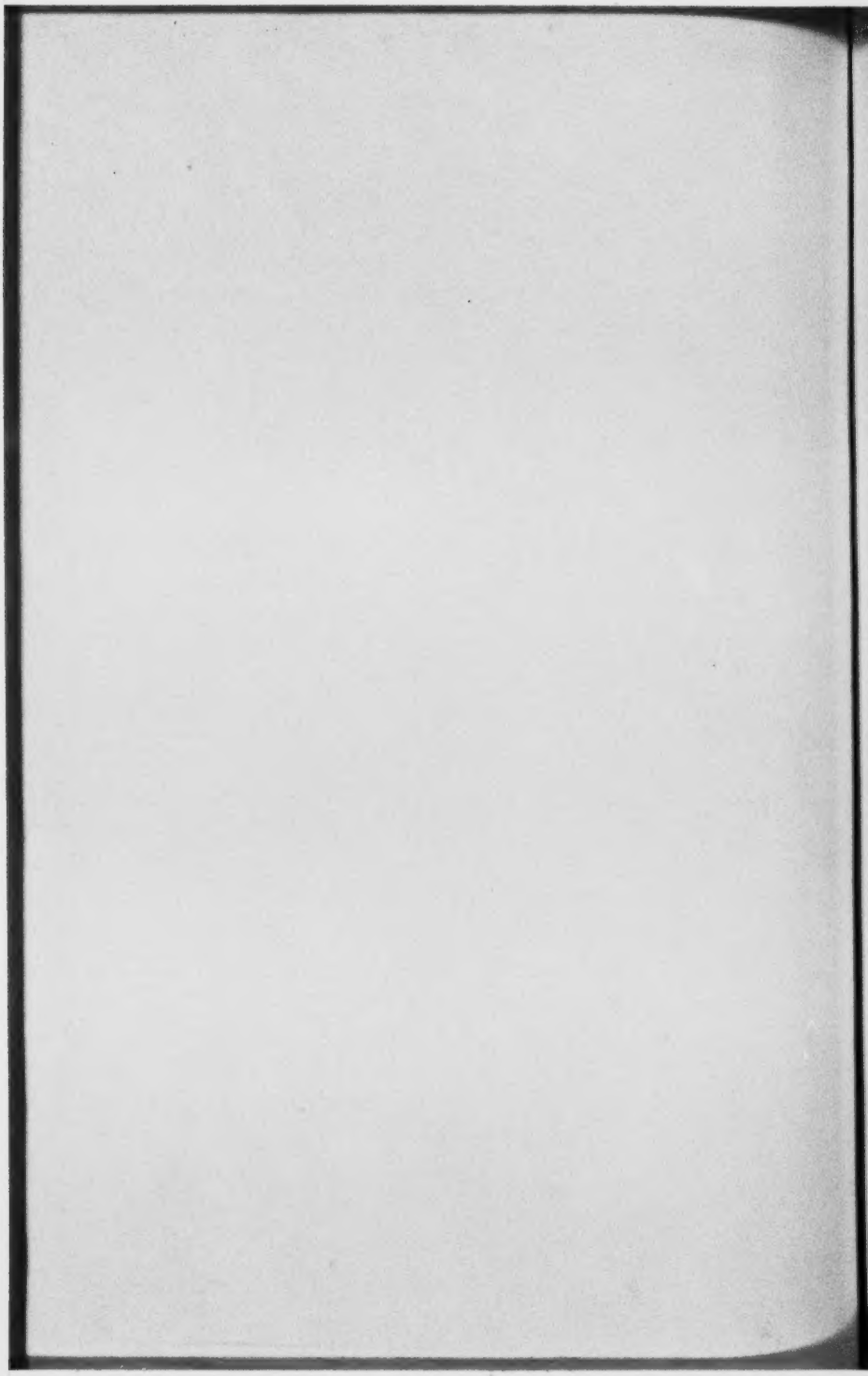
PRAYER FOR WRIT.

Wherefore your petitioner, Chattanooga Bakery, Inc., a corporation, respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Sixth Circuit, commanding that court to certify and send to this Court for its review and determination, on a day

certain to be therein named, a full and complete transcript of the record and all proceedings in the case cited on its docket as No. 8998, styled, *National Labor Relations Board, Petitioner,* v. *Chattanooga Bakery, Inc., and Mountain City Mill Company, Respondents,* and that said judgment of the said United States Circuit Court of Appeals for the Sixth Circuit may be reversed by this Honorable Court, and that your petitioner may have all other and further relief in the premises as the Honorable Court may deem meet and just; and your petitioner will ever pray.

Chattanooga Bakery, Inc.,
By Cecil Sims,
Attorney for Petitioner.

Bass, Berry & Sims,
Of Counsel.



Supreme Court of the United States

OCTOBER TERM, 1942.

No. .....

CHATTANOOGA BAKERY, INC., PETITIONER,

VS.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

JURISDICTION.

The opinion of the United States Circuit Court of Appeals for the Sixth Circuit is printed in the record and is reported under the style *National Labor Relations Board* v. *Chattanooga Bakery, Inc.*, in 127 F. 2d, at 201 *et seq.* The opinion and judgment of the United States Circuit Court of Appeals were handed down and entered on April 15, 1942. Thereafter a petition for rehearing on behalf of Chattanooga Bakery, Inc., was filed pursuant to the rules of the court, was entertained and was denied on June 29, 1942, Justice Swinford dissenting. The de-

cree of the United States Circuit Court of Appeals did not become final therefore until June 29, 1942.

Citizens' Bank v. *Opperman*, 249 U. S. 448, 450.
Gypsy Oil Co. v. *Escoe*, 275 U. S. 498.

The statutory provision believed to sustain the jurisdiction is Section 240 of the Judicial Code (28 U. S. C. A., Sec. 347).

II.

STATEMENT OF THE CASE.

Under the essential facts the following important questions are involved in this case:

(1) Was the finding of the National Labor Relations Board as to discrimination by petitioner in the employment of applicants supported by such relevant evidence as a reasonable mind might accept as adequate to support such a conclusion, or, stated alternatively, was such finding based on surmise, suspicion and conjecture?

(2) Is it proper to give probative force to events which transpired during the previous ownership and operation of the bakery properties more than a year prior to the purchase and acquisition thereof by petitioner where the National Labor Relations Board in the same proceeding dismissed the charges predicated thereon against the previous owner by holding that such events may nevertheless constitute substantial evidence to support a charge of discrimination against a subsequent purchaser of the property in the hiring of applicants for employment?

(3) National Labor Relations Board, having the burden of proof in this proceeding, sought to establish a conflict in testimony so as to make its findings of fact final by first calling as its *own witnesses* Sam H. Campbell, Jr., President of petitioner corporation, David A.

Parks and Mitchel P. Shauf, Secretary and General Manager of petitioner corporation. These witnesses, under the Board's examination, established affirmatively sound reasons for the refusal to hire each of the applicants. The Board thereupon introduced the applicants and sought to impeach the testimony of its previous witnesses by having such applicants testify contrary to the Board's previous witnesses, thereby impeaching the credibility of its own witnesses. This presents a new and undetermined question of whether or not the Board, having the burden of proof, may make its own findings of fact final by deliberately offering testimony *the purport of which it knows in advance* and then impeaching its own testimony upon the theory that it has thereby created a controverted issue of fact.

(4) The case involves this further question: Fifteen employees hired by petitioner left their employment as a protest against petitioner's failure to hire the other applicants. Under Section 2(3) of the National Labor Relations Act these fifteen employees cannot be ordered reinstated unless their work ceased as a consequence of or in connection with a current labor dispute or because of an unfair labor practice. Section 2(9) of the Act defines "labor dispute" as a controversy concerning terms, tenure or conditions of employment or concerning the representation of employees in such matters. While this Court in *Phelps-Dodge* v. *National Labor Relations Board,* 313 U. S. 177, extended the protection of the Act to applicants, it did not make such applicants *employees.* Should the decision of this Court in the Phelps-Dodge case be extended by construing labor disputes as defined in the statute to include a controversy between a mere applicant and a prospective employee?

(5) Section 2(3) of the National Labor Relations Act apparently limits continued employee status to those individuals who have left their jobs because of a current

labor dispute or who have been wrongfully discharged by an unfair discrimination denounced by the Act. There is no provision in the law fairly indicating that it was the intent of Congress to permit employees to voluntarily leave their work in protest against the failure to hire an applicant for employment whose individual rights on account of such discrimination are amply protected under the law. Should the status of continuing employment be further extended under such circumstances to employees who cease work merely in protest of petitioner's failure to hire an applicant who never attained the status of employee?

The foregoing questions will be further amplified in the argument.

III.

SPECIFICATIONS OF ERROR.

(1) The United States Circuit Court of Appeals for the Sixth Circuit erred in holding that the finding of discrimination made by the National Labor Relations Board was supported by substantial evidence. Petitioner insists that there is no substantial evidence in the record to support such findings.

(2) The United States Circuit Court of Appeals for the Sixth Circuit erred in holding in legal effect that petitioner as the subsequent purchaser of the bakery properties was responsible for acts occurring more than a year prior thereto under previous ownership and operation of the bakery and in giving probative effect thereto against the petitioner by holding that such antecedent transactions constitute substantive evidence against the petitioner.

(3) The United States Circuit Court of Appeals for the Sixth Circuit erred in holding in legal effect that an issue of fact was created by the action of the National

Labor Relations Board at the hearing in offering testimony to impeach the previous testimony of its own witnesses, such previous testimony having been offered with a full knowledge of its import and that such impeachment of its own witnesses reaised an issue of fact so as to make the findings of the Board conclusive.

(4) The United States Circuit Court of Appeals for the Sixth Circuit erred in holding in legal effect that petitioner's failure to hire an applicant for employment constituted a labor dispute as defined in Section 2(9) of the Act so as to warrant a further holding of continuing employment status with respect to those employees who voluntarily quit their jobs because of the refusal to hire such applicants.

IV.

ARGUMENT.

Burden of Proof.

The burden of proving discrimination on account of union membership or activity by *affirmative evidence* (as distinguished from a mere lack of evidence, or surmise, suspicion and conjecture) is upon the Board.

The rule with respect to the burden of proof in proceedings of this nature was well stated in *National Labor Relations Board* v. *Goshen Rubber & Manufacturing Company,* (C. C. A. 7) 110 F. 2d 432, in the following language:

> "It is well to remember that the National Labor Relations Act does not interfere with the normal right of the employer to select his employees or to discharge them. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1, 45, 46, 57 S. Ct. 615, 81 L. Ed. 893, 108 A. L. R. 1352; *that the burden of proving that an employee has been discriminatorily discharged is upon the complainant and the Board. National Labor Relations Board* v. *A. S. Abell Co.,* 4 Cir., 97 F. 2d 951, 957; that interference with the right of an employer to determine when an employee is inefficient should not be lightly indulged in when applying the Act. *National Labor Relations* v. *Thompson Products,* 6 Cir., 97 F. 2d 13, 17, and that orders without a basis in evidence having no rational probative force, are not justified. *National Labor Relations Board* v. *Falk Corp.,* 7 Cir., 102 F. 2d 383 (Italics ours).
>
> p. 436.

The failure of the Board to credit affirmative testimony will not supply the lack of affirmative proof, as

was stated in *National Labor Relations Board* v. *A. S. Abell Company*, 97 F. 2d 951, at page 957:

> "In this respect the burden was upon the Union, and while the charge was supported only by conjecture and suspicion, it was refuted by positive and direct testimony. The failure of the Board to credit this testimony does not supply the lack of affirmative proof of unfair labor practice on the part of the employer."

Evidence which is merely consistent with the discrimination on account of union activity will not support the Board's conclusions, unless it is also inconsistent with a contrary hypothesis. We quote from a recent decision of the Circuit Court of Appeals for the Eighth Circuit, in which the court declined to enforce an order of reinstatement with respect to eleven discharged employees in the case of *Cupples Company* v. *National Labor Relations Board*, 106 F. 2d 100, at page 114:

> "The evidence that the Company welcomes the organization of an independent union of its employees and preferred such a union to any other, and made haste to recognize the Association as the sole bargaining representative for all of its employees, is not a sufficient factual basis for the finding of interference, domination and support. This for the reason that, while such evidence is consistent with the hypothesis that the formation and administration of the independent union was interfered with, dominated and supported by the Company, it is not inconsistent with the contrary hypothesis, and therefore supports neither. *Gunning* v. *Cooley*, 281 U. S. 90, 94, 50 S. Ct. 231, 74 L. Ed. 720; *Stevens* v. *The White City*, 285 U. S. 195, 204, 52 S. Ct. 347, 76 L. Ed. 699; *Ewing* v. *Goode*, C. C., 78 Fed. 442, 444; *Eggen* v. *United States*, 8 Cir., 58 F. 2d 616, 620."

The foregoing principle is well illustrated in the decision of *Bussman Manufacturing Company* v. *National Labor Relations Board*, (8 C. C. A.) 111 F. 2d 783, where

the court, in discussing the required evidence to show discriminatory discharge, said:

> "It is not sufficient to show merely that the employer may have discharged Likert on account of his union activities—the evidence must point to that fact. When the testimony shows, as it does here, that the cause of the discharge may have been one of two things, one of which was illegal and the other legal, the fact finding tribunal cannot guess between the two causes and find that union activities was the real cause when there is no satisfactory foundation in the testimony to support the conclusion. *Patton* v. *Texas & Pacific Railway Co.*, 179 U. S. 658, 663, 21 S. Ct. 275, 45 L. Ed. 361. When evidence is consistent with either of two inconsistent hypotheses it establishes neither. *Stevens* v. *The White City*, 285 U. S. 195, 204, 52 S. Ct. 347, 76 L. Ed. 699; *New York C. R. Co.* v. *Ambrose*, 280 U. S. 486, 490, 50 S. Ct. 198, 74 L. Ed. 562. Under these circumstances, had the case been tried to a jury, it would have been the duty of the trial judge to direct a verdict for the defendant. *Chicago, M. & St. P. Ry. Co.* v. *Coogan*, 1041; *Massachusetts Protective Assn.* v. *Mouber*, 8 Cir., 110 F. 2d 203, 206. Proof of mere sequence is not sufficient to establish *hoc ergo propter hoc* is sound neither in logic nor in law.
>
> * * * * * * *
>
> "His conduct would have justified his discharge had there been no labor controversy in progess. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45, 46, 57 S. Ct. 615, 81 L. Ed. 893, 108 A. L. R. 1352; *Link-Belt Co.* v. *National Labor Relations Board*, 7 Cir., 110 F. 2d 506, 512. In such a case the union activities of the employee alone in the promotion of a union to which the employer is hostile will not support the finding that he was discharged because of such union activities. *Burlington Dyeing & Finishing Co.* v. *National Labor Relations Board*, 4 Cir., 104 F. 2d 736, 739; *National Labor Relations Board* v. *Thompson Products*, 6 Cir., 97 F. 2d 13, 17; *National Labor Relations Board* v. *Empire F. Corporation*, 6 Cir., 107 F. 2d 92, 95; *Agwilines, Inc.*,

v. *National Labor Relations Board*, 5 Cir., 87 F. 2d 146, 147."
p. 787.

Where the employer offers a legitimate explanation for failure to hire one who is seeking employment, the Board then has the burden of establishing the falsity of this explanation. In *Martel Mills Corporation* v. *National Labor Relations Board*, 4 Cir., 114 F. 2d 624, the Board sought to enforce its reinstatement order with respect to certain employees which it had concluded were discharged because of union membership and activity. As in the present case, the Board sought to support its conclusions by isolated instances of personal bias and antagonism on the part of supervisory employees. The employer gave an explanation as to the cause of discharge, which was reasonable. In denying the right of enforcement, the court said:

"If his explanation is a reasonable one, the onus is upon the Board to establish the falsity of this explanation and the truth of its own interpretation. See *National Labor Relations Board* v. *Remington Rand, Inc., supra*, 94 F. 2d, at page 862. We are not convinced that the Board has offered sufficient evidence to meet its burden of proof. Isolated statements which alone carry incriminating import often lost their ominous significance when surrounded by all the facts of a given case.

* * * * * * *

" 'The National Labor Relations Act was not intended to empower the Board to substitute its judgment for that of the employer in the conduct of his business. It did not deprive the employer of the right to select or dismiss his employees for any cause except where the employee was actually discriminated against because of his union activities or affiliation. * * * The Act does not vest in the Board managerial authority.' Garrecht, C. J., in *National Labor Relations Board* v. *Union Pacific Stages*, 9 Cir., 99 F. 2d 153, 177.

* * * * * * *

" 'The petitioner is at liberty, whenever occasion may arise, to exercise its undoubted right to sever his relationship for any cause that seems to it proper save only as a punishment for, or discouragement of, such activities as the act declares permissible.' *Associated Press* v. *National Labor Relations Board, supra,* 301 U. S., at page 132, 57 S. Ct., at page 655, 81 L. Ed. 953.

* * * * * * *

"Where economic considerations necessitate a contraction in the employer's labor force, the employer, in deciding which employees are to be retained, must be free to choose from the more capable and the more worthy. It would be an abuse of the terminology of the Act if an employer were obliged to discriminate in favor of union men as against non-union men through fear of action by the Board and the courts. Cf. *Jefferson Electric Co.* v. *National Labor Relations Board,* 7 Cir., 102 F. 2d 949, 957; *Appalachian Electric Power Co.* v. *National Labor Relations Board, supra,* 93 F. 2d, at page 989.

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"In the absence of evidence of any policy of proscribed discrimination, an employer should not be held strictly accountable for every isolated utterance of a policy-making officer concerning union activities. Cf. *National Labor Relations Board* v. *Union Pacific Stages, supra,* 99 F. 2d, at pages 178, 179; *Jefferson Electric Co.* v. *National Labor Relations Board, supra,* 102 F. 2d, at page 956. And, where the conduct and actions of the employer fail to indicate any violation of the Act, an assemblage of unrelated, unconnected expressions of opinion does not very deeply impress this Court."

pp. 633-634.

In the concluding portion of this brief petitioner has set out an extract of the record evidence showing the explanation and reasons given by petitioner for its failure to hire the complaining applicants. These reasons, if true, completely exonerate the petitioner from the charge of unfair labor practice. The Board evidently realizing that the burden of proof was upon it, offered peti-

tioner's executive officers and Superintendent *as the Board's witnesses* and thereby established their testimony as a part of its proof in chief. Then the Board, evidently realizing the courts have uniformly held that mere isolated utterances and incidents showing union antipathy on the part of subordinate officers and employees were not *alone* sufficient to support a finding of discrimination, undertook to create an issue of fact by impeaching the testimony relating to the reasons for rejection which it had offered as its proof in chief upon the theory that such contradictory testimony raised the question of the credibility of witnesses, the finding with respect to which was exclusively in the Board. The United States Circuit Court of Appeals sanctioned this practice and declined to consider testimony which it stated was "credible and persuasive," Circuit Justice McAllister saying:

> "Likewise, the credibility of witnesses is for the Board, and we find no basis for interfering with its conclusions relating thereto."

Further reference will be made hereafter to this situation. It is submitted that the United States Circuit Court of Appeals committed grievous error in declining to review the testimony on the theory that it was the Board's exclusive province to pass on credibility of witnesses (a) because the question of credibility arose out of the Board's effort to impeach the testimony of its own witnesses and (b) because the so-called impeaching testimony of the rejected applicants on cross examination not only failed to contradict the Board's prior witnesses but corroborated and supported their testimony.

Incidents under Prior Ownership Not Imputable to Petitioner.

It will be observed that after the Board had reviewed the incidents occurring subsequent to July 1, 1939, and the testimony with respect to each individual whose ap-

plication was rejected, it stated its conclusion of discrimination as its conviction taken *"from the foregoing facts"* (R. 66). The Board evidently realized the weak and colorless factual basis upon which it had rested its conclusions, and sought to reinforce them by adding to its previous "conviction" its speculative "belief" which it rested entirely upon generalizations gleaned from incidents occurring more than a year before the corporate existence of petitioner, and while the supervisory employees hired by petitioner and the complaining applicants were engaged in a previous employment for the Mill Company. It is respectfully submitted that no adverse imputation can be asserted against petitioner in the present case, based upon incidents occurring prior to its organization and acquisition of the bakery under the former operation by the Mill Company. The Board did not find any connection to exist between the two companies, and further found as a fact that the closing of the mill and the sale of the bakery was due solely to operating losses and was not due to any desire to eliminate the union (R. 33). The basis of imputing to the employer adverse statements and criticisms of supervisory employees as a background against which to judge the reasons for the discharge or failure to hire is in the last analysis *"respondeat superior."*

> "It is elementary that a principal is only bound by the acts of an agent which are within the scope of the actual, implied or apparent authority of that agent. Miss Weitzel had no actual authority from the Company to encourage or discourage memberships in labor organizations. There is no evidence which would support a finding that she had implied authority to do so. Implied authority is nothing more than actual authority circumstantially proved. *Koivisto* v. *Bankers' & Merchants' Fire Ins. Co.,* 148 Minn. 255, 181 N. W. 580; 2 C. J. 435; *Hall* v. *Union Indemnity Co.,* 8 Cir., 61 F. 2d 85, 92. So far as her apparent authority is concerned:
>
> " 'It is only acts within the scope of the apparent authority with which the principal clothes the agent, not those within the scope of the apparent authority

with which the agent wrongfully clothes himself, without the assent or knowledge of his principal, that are binding upon the latter.' *Chicago, St. P., M. & O. Ry. Co.* v. *Bryant*, 8 Cir., 65 Fed. 969, 973. See also *Hall* v. *Union Indemnity Co.*, 8 Cir., *supra*, 61 F. 2d, at page 91."

Cupples Company v. *National Labor Relations Board*, 106 F. 2d 100, at page 114.

It is clear that under well settled principles of law that incidents and transactions occurring while the parties involved were engaged in a previous employment can not be made the factual basis of discrimination alleged to have occurred after the termination of the prior employment and in connection with solicitation for employment with petitioner. This, however, was done by the Board in the present case (R. 68, 69), and its action in so doing was expressly approved and sustained by the court.

Surmise, Suspicion and Conjecture.

But even taking into consideration every incident relied on by the Board, and eliminating all of the testimony contradictory thereof adduced by and received from witnesses who were called and offered by the Board and for whose credibility the Board vouched, it is earnestly insisted that a conclusion of discrimination rested thereon has no more basis than mere surmise, suspicion and conjecture and, therefore, does not have the support of substantial evidence which is required before the order will be enforced.

The Supreme Court of the United States in *Consolidated Edison Company* v. *National Labor Relations Board*, 305 U. S. 197, 83 L. Ed. 126, has laid down the definite legal requirements with respect to substantial evidence before an order of the Labor Board will be enforced, and has asserted and defined the right of this court to consider only substantial evidence with probative value, and

to refuse enforcement in the absence thereof. We quote from the opinion of Chief Justice Hughes:

> "The companies contend that the Court of Appeals misconceived its power to review the findings and, instead of searching the record to see if they were sustained by 'substantial' evidence, merely considered whether the record was 'wholly barren of evidence' to support them. We agree that the statute, in providing that 'the findings of the Board as to the facts, if supported by evidence, shall be conclusive,' means supported by substantial evidence. *Washington, V. & M. Coach Co.* v. *National Labor Relations Bd.*, 301 U. S. 142, 147, 81 L. Ed. 965, 970, 57 S. Ct. 648. Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Appalachian Electric Power Co.* v. *National Labor Relations Bd.*, (C. C. A. 4th) 93 F. 2d 985, 989; *National Labor Relations Bd.* v. *Thompson Products*, (C. C. A. 6th) 97 F. 2d 13, 15; *Ballston-Stillwater Knitting Co.* v. *National Labor Relations Bd.*, (C. C. A. 2d) 98 F. 2d 758, 760. We do not think that the Court of Appeals intended to apply a different test. In saying that the record was not 'wholly barren of evidence' to sustain the finding of discrimination, we think that the court referred to substantial evidence. *Ballston-Stillwater Knitting Co.* v. *National Labor Relations Bd.*, (C. C. A. 2d) 98 F. 2d 758, *supra.*
>
> "The companies urge that the Board received 'remote hearsay' and 'mere rumor.' The statute provides that 'the rules of evidence prevailing in courts of law or equity shall not be controlling.' The obvious purpose of this and similar provisions is to free administrative boards from the compulsion of technical rules so that the mere admission of matter which would be deemed incompetent in judicial proceedings would not invalidate the administrative order. *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 44, 48 L. Ed. 860, 869, 24 S. Ct. 563; *Interstate Commerce Commission* v. *Louisville & N. R. Co.*, 227 U. S. 88, 93, 57 L. Ed. 431, 434, 33 S. Ct. 185; *United States* v. *Abilene & S. R. Co.*, 265 U. S. 274, 288, 68

L. Ed. 1016, 1022, 44 S. Ct. 565; *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420, 442, 74 L. Ed. 524, 535, 50 S. Ct. 20. But this assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence."

p. 140.

The United States Circuit Court of Appeals for the Sixth Circuit, in *National Labor Relations Board* v. *Empire Furniture Corporation*, 107 F. 2d 92, refused to enforce an order of the Board where the findings of fact were based upon inference and conclusions very similar to those in the present case. In the Empire Furniture Corporation case, there was evidence that some of the supervisory foremen had made adverse comments on the union, even to the extent of reporting its members as "a bunch of communists fit to stir up trouble." The court pointed out, however, that there was no evidence that these observations reflected the view of the management, or that the foremen were expected to, intended or did permit their personal views upon organization to influence them in the hiring or discharging of employees. The court declined to accept the conclusions of the Board with the further statement that "we understand fully that the Board is not bound strictly by technical rules of evidence. We do not understand that this is a caveat to arbitrarily substitute surmise, suspicion and conjecture for proof."

In *National Labor Relations Board* v. *Columbian Enameling & Stamping Company*, 306 U. S. 392, 83 L. Ed. 627, Mr. Justice Stone, in delivering the opinion of the court, said:

"Section 10(e) of the Act provides: '* * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive.' But as has often been pointed out, this, as in the case of other findings by

> administrative bodies, means evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred. *Washington, V. & M. Coach Co.* v. *National Labor Relations Board,* 301 U. S. 142, 81 L. Ed. 965, 57 S. Ct. 648; *Consolidated Edison Co.* v. *National Labor Relations Bd.,* decided December 5, 1938 (305 U. S. 197, *ante,* 126, 59 S. Ct. 206); *Appalachian Electric Power Co.* v. *National Labor Relations Bd.,* (C. C. A. 4th) 93 F. 2d 985, 989; *National Labor Relations Bd.* v. *Thompson Products,* (C. C. A. 6th) 97 F. 2d 13; *Ballston-Stillwater Knitting Co.* v. *National Labor Relations Bd.,* (C. C. A. 2d) 98 F. 2d 758, 764. Substantial evidence is more than a mere scintilla, and must do more than create a suspicion of the existence of the fact to be established. 'It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' *Consolidated Edison Co.* v. *National Labor Relations Bd.,* 305 U. S. 197, *ante,* 126, 50 S. Ct. 206, *supra,* and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. See *Baltimore & O. R. Co.* v. *Groeger,* 266 U. S. 521, 524, 69 L. Ed. 419, 422, 45 S. Ct. 169; *Gunning* v. *Cooley,* 281 U. S. 90, 94, 74 L. Ed. 720, 724, 50 S. Ct. 231; *Appalachian Electric Power Co.* v. *National Labor Relations Bd., supra,* (C. C. A. 4th) 93 F. 2d 989."

Circuit Judge Allen of the Sixth Circuit, in *Ohio Power Company* v. *National Labor Relations Board,* 115 F. 2d 839, said:

> "The employment by an industrial plant of a former detective, with knowledge of his past business connections and experience, may arouse a suspicion of the nature of that employment. But to sustain a finding that petitioner employed a labor spy, the evidence must amount to more than suspicion and conjecture."

The Board's decision is replete with generalizations based solely on surmise and suspicion. For example, it stated that Superintendent Shauf, who was on petitioner's

employment committee, had expressed opposition to the union, refused to consider relatives of union members for employment, and threatened to resort to some expedient to rid the mill company of the union (R. 69). But the Board found as a fact that the sale of the bakery by the Mill Company "was not caused by a desire to eliminate the Union, but was dictated by business considerations," and dismissed this complaint against the Mill Company (R. 33). The alleged threat of Shauf was, by the Board's own finding, never carried into execution. On the other hand, the record contains numerous admitted instances of close and continued friendship between Shauf and active members of the union. Any incriminating inferences based solely and alone upon the fact that twenty-six out of twenty-seven rejected applications were former union members is completely off-set by the fact that more union members were employed by petitioner than were rejected, and among those employed were the two most active union members, to-wit, Luther Phillips, the President, and Manerva Sutton, Secretary, both of whom were on the grievance committee. The following comment under analogous circumstances is found in *National Labor Relations Board* v. *Goshen Rubber & Manufacturing Company*, 110 F. 2d 432, at page 436:

> "While the fact that Lyle Armstrong and Hoffman were members of the United may furnish grounds for suspicion that their discharge was on that account, on the other hand, Earl Lantz, then president of the United, and 25 other employees who were members of the United were not discharged. To us the evidence is clear that Lyle Armstrong was discharged for refusing to obey instructions, and Hoffman for violating the rule prohibiting smoking during working hours, and Merle Armstrong for inefficiency and causing disturbances at the plant."

The Board laid great emphasis upon an incident which occurred between Luther Phillips, the President of the union, and Manerva Sutton, the Secretary, prior to their

application for employment with petitioner, from which the Board concluded that Phillips, who was a foreman (but who was also still the union leader), stated to Sutton that the union would lose its majority status as the result of the personnel policy planned by petitioner (R. 629). There was not the slightest evidence that petitioner ever heard of this incident or approved it, and on the other hand, the testimony shows that it was a private and confidential conversation between the union members and officials. The record discloses that when this conversation took place, it was generally known among the Mill Company employees that petitioner had purchased the bakery and would take it over in a few days. Manerva Sutton stated that all she asked Luther Phillips was:

> "I want to know when we are going back to work and who else is going back to work and when."

Phillips replied:

> "All I can tell you, Manerva, is that Mr. Shauf told me we were going back to work on July 5th."

Thereupon Manerva Sutton told him that if any of the union members were left out, there would be trouble, because jobs were hard to get, and that the jobs in the plant belonged to each individual who was working there, and if they were let out on account of union activities, there was going to be some trouble. Phillips volunteered the further information that Mr. Hutcheson, who was connected with the old mill and had nothing to do with the management of the new bakery, had told him that the committee was going back to work, but that was all he knew (R. 630). As a matter of fact, one member of the committee was not employed by petitioner, so that Hutcheson's information was erroneous.

Manerva Sutton also testified that she and Phillips had a conversation in a parking lot, in which Phillips sug-

gested disbanding the union and predicted that there would be few members left after the change in management. In the same conversation, he stated that Mr. Campbell would make a perfect manager. Both Phillips and Sutton, of course, knew that the union contract contained a clause which expressly provided for its termination in the event of a sale of the bakery. Phillips' conversation is perfectly consistent with the theory that because of the termination of the union contract and subsequent fair treatment by Campbell, the union members would lose interest in paying dues to the union. His statement that there would not be more than a half dozen union members "who will return to work," could mean either that union members might decline to return to work because of the termination of the union contract, or that the new company might not hire more than a half dozen members. *But as a matter of undisputed fact, the new company hired twenty-nine union members, including both Phillips and Sutton.* These incidents in the light of undisputed facts have absolutely no probative value, and indeed are not even a reasonable basis for conjecture or surmise to establish discrimination on account of union members. The Board attached significance to the statement by Foreman Cleary to a union member, who had been hired by the petitioner, that she would be discharged unless she abandoned her union activities, where the record shows that she was not thereafter discharged but quit voluntarily, and to what the Board refers to as a "rhetorical" question to an employee as to whether or not she regretted joining the union. The mere fact that the Board by strained construction and warped meaning sought to rest its conclusions on discrimination on such insignificant and colorless incidents as these is but evidence of the fact that the Board itself must have recognized the poverty of its reasoning.

Party Cannot Impeach Credibility of Its Own Witnesses in the Absence of Entrapment, Hostility or Surprise.

At the beginning of the hearing of the testimony before the Examiner the Board called as its own witnesses S. C. Hutcheson, an officer of the Mill Company, S. H. Campbell, Jr., President of petitioner corporation, Mitchell P. Shauf and David A. Parks, Superintendent and General Manager of petitioner corporation. On direct examination as the Board's witnesses and as testimony offered by the Board, these witnesses denied the various incidents and conversations upon which the Board finally rested its decision of discrimination and affirmatively testified in substance that the rejections of the applications were based solely upon the applicants' ability, temperament, integrity, inteligence and other factors not connected with union activities or affiliation. After offering these witnesses and vouching for their credibility, the Board then sought to impeach the testimony of their own witnesses by offering other witnesses who contradicted their testimony. All of the evidence offered by the Board in its effort to impeach the testimony of its own witnesses by contradicting them was objected to by petitioner and a motion was made to strike the entire testimony insofar as it sought to contradict the testimony of its previous witnesses, but the trial examiner admitted the evidence and overruled the motion to strike (R. 652).

The Board rested its decision entirely upon the evidence offered for the purpose of impeaching and contradicting its own witnesses Hutcheson, Campbell, Shauf and Parks, and expressly stated in its decision that it rejected the affirmative evidence of its own witnesses because such witnesses were evasive and not worthy of belief.

It is respectfully submitted that such action by the Board was erroneous and that the contradictory evidence upon which the Board rested its entire decision was inadmissible and cannot be considered as substantial evi-

dence in support of the Board's decision. It is true that the National Labor Relations Act expressly provides that the rules of evidence prevailing in courts of law or equity shall not be controlling, but this section of the Act has been construed and limited by the Supreme Court of the United States to mean that the admission of evidence which is incompetent in law or equity courts will not require the setting aside of the Board order, *but* such evidence will not be considered as substantial evidence to support the Board's order.

Consolidated Edison Co. v. *National Labor Relations Board*, 305 U. S. 197, 83 L. Ed. 126.

When this impeaching evidence is removed from consideration, the Board's decision has no support whatsoever in the testimony. It has long been settled that a party cannot impeach the credibility of his own witness.

> "A party cannot impeach a witness whom he has introduced either in a civil or in a criminal case. The general rule as stated above, however, has been held in numerous decisions to be subject to exception in cases of entrapment, hostility or surprise, resulting in the party being misled by the witness, and prejudiced thereby, in which cases allowing a party to impeach his own witness is largely within the discretion of the trial court, whose decision may be reversed only for abuse in its exercise. However, a party may refresh his witness' recollection, or he may prove the truth of any particular fact by any other competent testimony in direct contradiction of his own witness' testimony."
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> 70 C. J., Witnesses, Sec. 991, pp. 793-795.

This rule of evidence has long prevailed in the Federal Courts and has been approved by the Supreme Court of the United States, as will appear from the following quotation:

> "When, however, it is considered that the witness was himself called by those who now bitterly assail him, and that by calling him they asserted his

credibility, they ought not to be heard now to impeach his testimony, or to insist that the special master was wrong in believing him, when the exceptants had asserted that he was worthy of belief by putting him upon the stand in support of the issues devolving upon them. The practice of attempting to impeach the testimony of one's own witness is not a common one; but it nevertheless is the subject of condemnation. In *Entwisle* v. *Seidt et al.*, (D. C. N. Y.) 155 Fed. 964, 19 Am. Bankr. Rep. 185, Judge Chatfield gives the matter some consideration. The matter is also considered in *Jacobs* v. *Van Sickle*, (C. C. A. 3d Cir.) 127 Fed. 62, 61 C. C. A. 598, 11 Am. Bankr. Rep. 470, by Judge Gray, of this circuit. The case most directly in point, however, seems to be *Dravo* v. *Fabel*, 132 U. S. 487, 10 S. Ct. 170, 33 L. Ed. 421."

In re San Miguel Gold Min. Co., 197 Fed. 126, 127.

It is also the rule in Tennessee, where the litigants reside and the hearing took place.

"In the progress of the trial in the circuit court, plaintiff introduced defendant Duncan and asked him a few questions which were not at all material to his defense. Defendants' counsel thereupon proposed to cross-examine the witness as plaintiff's witness. This was not permitted. The defendants offered a special request to the trial judge, to be given in charge to the jury, to the effect that defendant Duncan was plaintiff's witness, and his credibility was vouched for by plaintiff. This request was denied, and the circuit judge held that Duncan was not plaintiff's witness, and plaintiff could contradict statements which he made in his own defense. Plaintiff did contradict him in material matters, by proving that he made statements out of court which he denied in court. We are constrained to hold that this is reversible error. The question was gone over by this court in the case of *Sands* v. *Southern Ry. Co.*, 108 Tenn. 1, 64 S. W. 478, and the authorities, both English and American, reviewed. The court adopted the English rule to the effect that, if a party calls a

witness and examines him upon a single point, the other party is then at liberty to cross-examine him generally, and, of course, it has never been doubted that, when a litigant tenders a witness to testify in his behalf, he thereby vouches for his credibility. This extends to the whole case."

Hale v. *Johnson,* 140 Tenn., at pp. 202-203.

In order to comply with the constitutional requirements a hearing before the National Labor Relations Board must conform to fundamental principles of judicial procedure as otherwise there would be a violation of the due process of law clause of the Federal Constitution.

National Labor Relations Board v. *Jones & L. Steel Corp.,* 301 U. S. 1, 81 L. Ed. 893.

Meyers v. *Bethlehem Shipbuilding Corp.,* 303 U. S. 41, 82 L. Ed. 638.

In the case of *National Labor Relations Board* v. *Prettyman,* 117 F. 2d 786, recently decided by the Sixth Circuit, Judge Hamilton said:

"An employer is entitled to a hearing of and decision on the charges against him according to the fundamental principles that inhere in due process of law, and indispensable requisites of such hearings are that the course of proceedings shall be appropriate to the case and just to the employer; that he shall be notified of the charges against him in time to meet them and shall have an opportunity to be heard and cross-examine the witnesses against him and shall have time and opportunity at a convenient place, after the evidence against him is produced and known to him, to produce evidence and witnesses to refute the charges, and that the decision of the Board shall be governed by and based upon the evidence produced at the hearing.

* * * * * * *

"Congress has given the Board the authority to administer the National Labor Relations Act, subject to the supervisory power of the Court of Appeals and the court must act within the bounds of the statute, without intruding upon the administrative prov-

ince, but it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action. *Ford Motor Company* v. *National Labor Relations Board*, 305 U. S. 365, 373, 59 S. Ct. 301, 83 L. Ed. 221. The court is not compelled to enforce an order of the Board which is impregnated with a hearing not comporting with the standards of fairness inherent in procedural due process. So scrupulous are our courts to maintain the supremacy of the ordinary law in cases where officers of the Government itself are concerned, they will not permit the Government to profit in any way by wrongs which its officers have committed. *Silverthorn Lumber Company* v. *United States*, 251 U. S. 385, 391, 40 S. Ct. 182, 64 L. Ed. 319, 24 A. L. R. 1426.

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"Even if the order of the Board were justified by the facts, which we are not here deciding, the necessity of according due process of law to the respondents is not obviated. No order is just if obtained without due process of law; otherwise, the Board could enter orders without a hearing. *Ohio Bell Telephone Company* v. *Public Utilities Commission*, 301 U. S. 292, 304, 57 S. Ct. 724, 81 L. Ed. 1093."

117 F. 2d, at pp. 790, 791, 791-792.

In *National Labor Relations Board* v. *Bell Oil & Gas Co.*, 98 F. 2d 406, Holmes, C. J., speaking for the Fifth Circuit, said:

"While technical rules of evidence which thwart justice should be abolished, it would be impossible for courts to function if all limitations upon the scope of evidence were removed. To stop needless delays, expedite business, and keep prejudice from creeping into the trial, it is necessary for courts to stay within the bounds of relevancy. *Fair rules of evidence are essential in a judicial hearing. Without them, the proceeding is more or less of an inquisition.*

"Congress intended for the administrative and quasi-judicial proceedings before the Board to be free, within constitutional limitations, from the ordinary rules of evidence, but upon petition to the court, and the filing therein of a transcript of the entire rec-

ord, the nature of the proceeding is changed and becomes wholly judicial. Thereupon, the court is vested with exclusive jurisdiction of the cause and of the questions determined, and to be determined therein. There is nothing in the statute to indicate that this court should consider irrelevant, immaterial or incompetent evidence in this suit, for that is what it is, a suit to enforce an order of the Board, arising under a law of the United States" (Italics ours).
98 F. 2d, at p. 410.

In *Ohio Power Co.* v. *National Labor Relations Board,* 115 F. 2d 839, Judge Allen of the Sixth Circuit Court enforced this rule in a similar proceeding, as will appear from the following quotation from this Court's opinion:

> "Stithrath was an evasive witness, but as he was called by the Board and not by the petitioner no imputation of concealment can be made against petitioner because of Stithrath's failure to remember things which he could hardly have forgotten."

It is therefore respectfully submitted that in this proceeding the Court should and must disregard the evidence offered by the Board to impeach its own witnesses and that this ground alone is sufficient to deny enforcement of the Board's order, or at least to require the Board to reconsider the case and to disregard such evidence.

Legal Status of Fifteen Employees Who Voluntarily Quit.

The Board's order further requires the petitioner to reinstate with back pay fifteen union members whose applications were accepted and approved by petitioner and who became employees but who voluntarily left their work with petitioner as a protest against petitioner's failure to employ all applicants who were union members. As we have heretofore shown in this brief, petitioner's rejection of the applications was not based upon union affiliations or discrimination. It is conceded that the rejected applicants were never at any time employees of peti-

tioner. It must therefore be admitted that the protest made by applicants who had never been employees could not itself amount to a "strike, since a strike is a voluntary cessation of work by *employees*.

The decision of the Supreme Court of the United States in *Phelps-Dodge* v. *National Labor Relations Board*, 313 U. S. 177, 85 L. Ed. 1271, extended the protection of the National Labor Relations Act to applicants but it did not make such applicants employees. Under Section 2(3) of the Act, the term "employee" is defined to include any individual whose work has ceased as a consequence of or in connection with any current labor dispute or because of any unfair labor practice. A "labor dispute" is defined by Section 2(9) as a controversy concerning terms, tenure, or conditions of employment or concerning the representation of employees in such matters. It is therefore clear that the failure to employ an applicant would not be a "labor dispute" as defined by Section 2(9) of the Act. It results therefore that neither reinstatment nor back pay could be ordered in this case under the theory that the fifteen employees named in Appendix "B" left their employment on account of a strike or a labor dispute. Therefore, if the Court finds that the Board's decision with respect to discrimination against the applicants for employment is not supported by substantial testimony, the fifteen union members who were employed and who voluntarily quit as a protest for the rejection of such applicants have no right to reinstatement or back pay.

National Labor Relations Board v. *Mackay Radio & Telegraph Company*, 304 U. S. 333, 82 L. Ed. 1381.

National Labor Relations Board v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, 83 L. Ed. 627.

National Labor Relations Board v. *Columbian Enameling & Stamping Co.*, 306 U. S. 392, 83 L. Ed. 660.

National Labor Relations Board v. *Sands Mfg. Co.*, 306 U. S. 332, 83 L. Ed. 682.

Furthermore, even if the refusal to hire the rejected applicants amounted to an unfair labor practice under Section 8(3) of the Act, the Board's remedy would be that set out in Section 10(c) of the Act, which would be limited to reinstatement with or without back pay of those applicants whom respondent wrongfully refused to hire. While it has been decided in a number of cases that an employee who leaves his employment on account of a strike is entitled to reinstatement because his employment was terminated as the result of a labor dispute, an unfair labor practice consisting only in the refusal to hire a particular individual because of union affiliations is a violation of the personal and individual rights of the rejected applicant and the injury thereby caused is completely remedied by ordering the employment with back pay of such wronged individual. It is submitted that Section 2(3) of the Act limits continuing employment to those individuals who have left their employment because of a current labor dispute or who have been wrongfully discharged by an unfair discrimination denounced by the Act. There is nothing in the Act which fairly indicates that it was the intention of Congress to permit employees to voluntarily leave their work as a protest against another individual employee whose rights are amply protected under the law. It is therefore respectfully submitted that under any aspect of the case these employees who quit merely as a protest against an injury done to the alleged violation of the individual rights of applicants who were not hired did not retain their status as employees and the Board was without authority to order their reinstatement or to order back pay.

The record shows affirmatively that when these employees voluntarily quit it was necessary to hire other employees to take their place in order to keep the plant running (R. 455). Under these circumstances it is submitted that where those employed under such circumstances are still working for petitioner and no vacancy exists, the Board is without authority to order their discharge in

order to make vacancies for these employees who voluntarily quit.

Testimony of Rejected Applicants.

It is earnestly submitted that the testimony of the rejected applicants, fairly considered, amounts to no more than a denial of the validity of the employment committee's conclusions on the factual basis which was admitted. Considered in the light most favorable to the Board, the only probative effect of the testimony of the applicants was to show that the committee's conclusions were unsound. *Such testimony does not to any extent affirmatively show that the action of the committee was based on union affiliation or membership.* Error in judgment is not an unfair labor practice.

We earnestly ask the Court to examine the following testimony in the light of the foregoing statement. This testimony must also be examined in the light of the admitted fact that the Mill Company had been extremely lax in the enforcement of efficiency and practically no effort had been made to maintain discipline or to enforce rules and regulations, due largely to the fact that the Mill Company was steadily losing money, was in the process of liquidation and was known to be going out of business, that salaries had been cut and morale completely dissipated (R. 456).

Inefficient or unsatisfactory employees who would not have been discharged under the situation above stated would not necessarily be employed by a new company that desired to improve standards of production and efficiency, and it must be recognized that individual lack of capacity or temperament which might not have moved the old company to discharge an employee would be valid reasons for a new company's refusal to hire such persons where the new company was endeavoring to improve the standard of efficiency so as to increase production and operate at a profit. *The mere fact that the Mill Company*

had permitted practices and received complaints without discharging an employee would certainly not render such employees desirable in a new company, and manifestly the failure or refusal of the new company to hire such an employee cannot be argued as a discrimination on the basis of union membership just because the old company permitted dereliction without discharge.

While it is true that the new employees hired by petitioner had had little or no experience in bakery operations, the proof shows without dispute that each new applicant was interviewed and petitioner obtained information concerning such applicant from references and from personal knowledge and recommendations, and each such applicant so employed was hired upon the theory that such person, in petitioner's judgment, would prove to be a satisfactory employee (R. 575, 852). *The proof further shows without dispute that after the employment of these individuals production increased and the operation of the bakery was more efficient than the previous operation under the Mill Company* (R. 455).

For the convenience of the Court, in summarizing the testimony with respect to the rejected applicants the individuals will be treated in the same order in which they were discussed in the decision of the Board, beginning at page 38 of the record.

MEDIA LOUISE BRAGG.

The testimony showed that this applicant was rejected because of her peculiar disposition and because she had caused quite a bit of disturbance in her department. Shauf testified that on some occasions Miss Bragg would refuse to speak to any person in the plant during the entire day, that she had a peculiar disposition and was hard to get along with, and he illustrates his testimony by stating that she had a sister who worked in the plant and to whom she had not spoken for years (R. 401).

Parks testified that the committee was unanimous in agreeing not to employ Miss Bragg because she was sullen and he supported his testimony with the statement that she had not spoken to him in a year (R. 532). He confirmed the fact that she was sullen and stated that although in the course of a business day he would see her six or eight times she on every occasion would turn her head around in an attitude of distaste and decline to look at him (R. 533-534). All of the members of the committee were of the opinion that she was disliked by her associates and this fact had previously been brought to Parks's attention (R. 535).

Media Bragg, in her testimony, admitted that she had had arguments in the plant (R. 665). She further admitted that she and her sister, who worked in the plant, were not on speaking terms and that when somebody tried to boss her she had had arguments (R. 666). She further admitted that she had not spoken to her sister for years unless she was asked something, and said: "I would have spoke to her if she spoke to me but unless she spoke to me I wouldn't speak to her" (R. 668). It is submitted that Media Bragg's own testimony fully corroborates and supports the testimony of Shauf and Parks that she had a peculiar disposition, was quarrelsome and a disturbing factor and therefore was unsuitable and undesirable as an employee.

MAGGIE WOODSON.

The testimony showed that this applicant had a high strung disposition, was hard to control at times, that she was changed to various departments and in each instance complained that the work was too hard for her and continually complained that lifting caused a pain in her side. When her father lost his job with the Mill she seemed to lose interest in her work and didn't seem to try to keep up her part of the work (R. 303-304, 538).

Parks testified that when these facts were reported to the committee he, as executive head of the bakery,

regarded her as a compensation hazard and that her physical disabilities would sooner or later develop into something serious for which the company would be held responsible (R. 538).

Mrs. Woodson admitted she worked under foreman Cleary off and on for a year or so and that she complained to the other employees that the work hurt her side, stating in substance that to stay on the job regularly all the time would kill any woman, and she testified that in her opinion if she had worked regularly on the job it would have killed her. The work which she was doing required her at various times to lift cases containing pies, which weighed around fifteen pounds. The lifting consisted in removing the fifteen-pound cases from a rack to a truck and stacking the boxes one on top of the other to a height about equal to her chin (R. 814-815). She admitted that her father had lost his job as nightwatchman at the Mill (R. 820). She also admited that she had been transferred around to various departments and had not stayed very long in any department (R. 822-823). She further testified that when Shauf gave her an option of working in either one of two departments she chose to work in the department where she was required to lift cases but they changed the work some so it would be easy on her. She had worked in one department for just one day and the longest she had ever worked in any department without changing was six months (R. 826-827).

It is submitted that this applicant's own statements afford a reasonable basis for the honest conclusion of the employment committee which was assigned for the rejection of her application.

BURVA BATEY.

This applicant had been employed by the Mill Company about three years. When work was scarce it was rotated and Shauf testified that Mrs. Batey was dissatisfied because of the amount of work that she got. The

forelady had talked to her about her complaints and she had regularly complained to Shauf and he had on a number of occasions been forced to instruct the forelady to reprimand her (R. 404).

In her own testimony Mrs. Batey admitted that she had complained to and had an argument with Shauf about her seniority. On another occasion she said that she had been removed from a job weighing cakes because Shauf claimed she was inefficient and that this was after Shauf had watched her in the performance of the work, this latter event occurring a short time before the Mill closed (R. 742). Batey's testimony that on other occasions she had been complimented by her forelady does not alter the undisputed testimony with respect to numerous complaints and arguments and the undisputed incident in which Shauf, after watching her work, had removed her from a job for inefficiency. Manifestly, under these admitted circumstances, Shauf's estimate, even though deemed erroneous by Mrs. Batey, was one which could reasonably be drawn from the facts which she admitted.

GUSSIE SHARP.

Shauf testified that Mrs. Sharp, on a number of occasions while working in the baking department, had assumed to take charge of the department and to give orders and instruct other employees what to do, "and it just didn't work out." This happened on a number of occasions and he stated that he recommended the rejection of her application because of her dispositon in wanting to give orders to the other girls would bring about dissention in the new company. He had instructed the forelady to reprimand her while working for the Mill because of this conduct (R. 406-407).

Mrs. Sharp, although called as a witness by the Board, failed to deny Shauf's testimony other than to say that no complaint was ever made to her knowledge about her assuming authority and that she had never made any complaint against other employees (R. 797).

The only conclusion which logically can be drawn from this testimony is that it had been reported to Shauf that Mrs. Sharp had undertaken to boss other employees, that he had instructed the forelady to reprimand her on a number of occasions, and it is clear that such was the affirmative reason for the rejection of her application. The applicant's testimony at the most tends only to indicate that in her opinion the criticism was unjustified. Nevertheless, it is clear that it was this criticism which was the basis of the rejection of her application.

CLAUDE E. GOUGER.

Gouger had been transferred from one department to another and when work was slack in the latter department he had insisted on being transferred back to the former department while it was running. Johnson and Shauf had talked about Gouger's dissatisfaction prior to his application (R. 408-410).

Claude Gouger in his testimony admitted his transfer from downstairs to upstairs and he further admitted that he had objected when the foreman declined to let him work downstairs when his regular work was slack and had gone over his foreman's head and complained to Shauf. It is clear from his testimony that he was dissatisfied with his foreman's refusal to let him work in the other department and that he complained that he was being discriminated against because other employees had been allowed the privilege of working in other departments during slack times.

The Court will note that after the Labor Board's attorney had finished with this witness and he had been dismissed Gouger insisted on continuing his testimony, saying "Let me put in another word if you don't mind," and thereupon he recounted instances when he had been treated unfairly while working for the Mill—none of which had the slightest connection with union affiliations.

In selecting employees for a new company it is quite easy to justify the rejection of this applicant on the basis

stated by Shauf. Even if one should not be inclined to agree with Shauf, it must be conceded that there was a factual basis wholly disconnected with union affiliations.

GAYTON, MULLINS, JOHNSON, ALINE GOUGER, ROGERS AND MURRAY.

These applicants were grouped together in the Board's discussion of the evidence because of certain criticisms directed at the group, in addition to individual objections, arising out of their joint participation in a certain incident which took place in the Mill.

Shauf testified that Aline Gouger didn't try to keep up her work. The foreman had complained to Shauf about her and the foreman had called her down on a number of occasions (R. 411). He also testified that the foreman reported he had had trouble controlling Edith Mullins and that she lost interest in her work. Marsouvia Rogers appeared to be dissatisfied and took no interest in her work. Foreman Cleary reported to Shauf that this entire group of girls, who worked together, were dissatisfied and apparently didn't try to keep up their end of the work. Cleary had reported that Mrs. Gayton had seemed not to be able to control her speech, and this whole group had apparently gotten beyond the control of the foreman. Shauf testified that when foreman Cleary reported this situation to him it looked like the company was about ready to fold up and he instructed Cleary to "rock along with it" and see if they could do anything with the situation (R. 410-411). Foreman Cleary specifically reported to Shauf that Maggie Gayton had recently led this group of employees in a revolt or mutiny in bitter denunciation of the company because they had been required to work *one minute* over time (R. 415). This extra one minute over time was required in taking out cakes that were in process in order to keep them from spoiling (R. 416).

Mrs. Gayton, in her testimony, admitted that in June, 1939, just before the Mill closed, she and Aline Gouger,

Edith Mullins, Julia Mazerole and Louise Kelley had complained to Luther Phillips, the president of the union, about having to work after quitting time and that Phillips said there wasn't anything he could do about it, and that on the following Monday her foreman Cleary had jumped on her about talking about over time and said that he was going to fire her for talking too much. She testified that after that she said nothing further about the over time (R. 721-722).

On cross examination Maggie Gayton admitted that at times the work in progress could not be stopped exactly on quitting time and sometimes it ran a minute or two over time (R. 723). When Luther Phillips, president of the union and a member of the grievance committee, refused to take the matter up, she admitted that she made no complaint to the business agent of the union and when her foreman Cleary asked her about it she denied having made the complaint to Luther Phillips (R. 724-725).

Edith Mullins admitted in her testimony that foreman Cleary had been required to call her down several times, the last occasion being shortly before she filed application for employment with the respondent. On this occasion she was called down for "hollering" but she claimed that Mrs. Vondrake, the forelady, was doing the hollering (R. 703). Just prior to that time she had been called down for hollering and she testified that it was someone else doing the hollering on that occasion (R. 704). This witness testified that when the group complained to Luther Phillips he told them they should go to the office and ask for over time (R. 706).

On cross examination she admitted that the foreman had to get after her "lots for talking out loud but sometimes it wasn't on account of me. * * *" She admitted that when she was called down for hollering she did not tell the foreman that it was someone else and not her and left him under the impression that she was the one doing it (R. 708-709). She admitted that it was not customary to pay any over time unless as much as fifteen

minutes was worked and this was because on some occasions they quit work before the regular time and on other occasions it ran a few minutes over (R. 710).

At the time of the trial foreman Cleary was seriously ill, at the point of death and not expected to live but a few days longer and therefore unable to testify, and too ill to be consulted (R. 471, 673, 713).

Aline Gouger, one of the complaining group, testified, in direct contradiction of Maggie Gayton, that she had never heard of any complaint to Luther Phillips (R. 718). Maggie Gayton testified that Aline Gouger was with her when the complaint was made (R. 721-722).

Jessie M. Johnson, another member of this group, testified that her husband, a union member, was one of those employed by respondent (R. 793). She stated she did not remember any discussion about the over time made in the icing room.

Marsouvia Rogers, who worked in the icing room with this group, testified positively that they were never required to work over time, and thereby denied the validity of the complaint which had been made by this group, saying, with reference to being required to work over time:

> "Q. And you would remember it if that had happened wouldn't you?
> A. Why, sure" (R. 802).

On re-direct examination she stated she might have worked a few minutes over time on some occasions but she didn't remember whether or not over time was asked for (R. 803).

Bessie Murray testified that she never remembered hearing any discussion about any over time in the icing department though at times she had gone to work five minutes early (R. 567).

A review of all of the testimony with respect to this group of employees in the icing room supports without

substantial discrepancy Shauf's statement that these employees had been complaining about working a few minutes over time and that it was impossible in the progress of the work to stop on the minute or to begin on the minute because of the nature of the work, without leaving some of the cakes to spoil. Foreman Cleary, who was at the point of death during the trial, had reported that these employees had gotten beyond his control and had asked that something be done about it. This was only a few weeks before the Mill closed down and the matter was allowed to rock along. However, when Shauf was confronted with the question of whether or not it was desirable to employ these applicants for the new company he decided for the foregoing reasons not to employ any of them. This was a matter which, of course, involved discretion and Shauf's decision to employ a complete new group in the icing room, even if erroneous, cannot be said to have had the slightest connection with union activities or affiliations of the individual applicants. There is no evidence that any of them were ever at any time active in the union. The respondent should not be held responsible for an honest exercise of judgment in a situation of this nature and this is emphatically so where there was no scintilla of evidence of discrimination on account of the union.

LOUISE KELLEY.

Shauf testified that he had been advised by foreman Cleary that Louise Kelley had notified him that her husband had a job out of town and she would probably move away at any time, and he therefore declined her application because she felt that she was planning to leave at any time. This report was given him about ten days before July 10, 1939 (R. 416).

Parks testified that he had received the same information (R. 54).

Louise Kelley admitted that on June 28th—just three days before she filed application for employment—she had

talked to Parks and he had told her that he had heard that her husband had gotten a job at the navy yard in Washington and asked her to tell him that he would see him in Washington. She also admitted that Cleary had asked her if she was going to move with her husband to Washington and testified that she told him that she wouldn't leave her job unless she was sure that her husband had a regular job in Washington (R. 769). She further testified that her husband had been continuously employed since he went to Washington and that she moved to Washington, where her husband was employed, about the middle of July, 1939 (R. 773).

Clearly the committee was justified in its stated reason for rejecting this application.

MATTIE CORNWELL.

Mattie Cornwell was the mother of Louise Kelley and the reason assigned by Shauf and Parks for the rejection of her application was that it was understood that she was going to Washington with Louise Kelley when she joined her husband (R. 429). Mrs. Cornwell testified that on one occasion when she had broken some pies foreman Cleary shook his fist in her face and told her it made no difference to them if she belonged to the union or didn't and that he had decided to fire her. She further testified, however, that Shauf told her that she did exactly right in breaking the pies. Clearly had nothing to do with selecting the new employees and if there was any discrimination against Mattie Cornwell it was by Shauf, who, she said, had supported her action in breaking the pies (R. 776). After her son-in-law moved to Washington about the middle of June, Cleary asked her whether she was going to Washington and she stated she told him she was not (R. 777).

On cross examination Mrs. Cornwell admitted that Shauf had talked with her about whether she was going to Washington with her daughter and he knew that her

son-in-law had already gone. She further admitted that she did go to Washington with her husband but remained only two weeks and they went to Nashville, where her husband had a job (R. 778).

While it is true that Mrs. Cornwell stated that she told the foreman she was not going to Washington, it is also clear from this testimony that Shauf and Parks were both under the impression that she was going with her daughter and it is also a fact that she did go to Washington. Mrs. Cornwell was fifty-three years old and there was no evidence that she had ever been active in the union, and whatever else may be said of the testimony it is clear that her application was not rejected on account of union activities.

MATTIE THOMAS.

Mrs. Thomas had been employed for many years in the loaf cake department, which was closed by the Mill Company about two years prior to the sale of the bakery, at which time she was transferred to the wrapping room and became greatly dissatisfied because she did not get steady work and had been disagreeable over a period of two years (R. 419). She claimed continuously that she was being discriminated against (R. 419). In her own testimony she stated she made complaint to Shauf and he "didn't give me any satisfaction whatsoever." She went back again and complained and Shauf told her that James Connor had full control of the matter and that he didn't have anything to do with it. She was then asked and answered:

"Q. Did you talk to Mrs. Vondrake about it?

A. No, sir, I didn't talk to Mr. Connor. He didn't care anything about me, and I didn't discuss it with him.

Q. Did you talk to Mrs. Vondrake about it?

A. No, very little. I felt she wasn't any friend of mine either—not in any way that she would fight for your rights."

(R. 756.)

She further testified that she was discriminated against and that if anything was missing the superintendent would claim that she had it and tell them to get it from her (R. 756). She volunteered the information that Shauf's son owed her some money. She tried to get Shauf to make him pay it but Shauf stated that his son wasn't working and that he had to keep him up himself (R. 758). This was a personal transaction between Mattie Thomas and Shauf's son and Shauf had endorsed the note. David Shauf had paid all of this indebtedness except $157 and had taken the bankrupt law but he did not schedule her as a creditor and promised to pay her after bankruptcy (R. 759). Mattie Thomas testified that the dissatisfaction in the Mill was caused by the NRA and that she could never get along with her foreman after the NRA. She said "he didn't like me and his appearance showed that he didn't like me" (R. 763). She said that Mrs. Vondrake, her forelady, didn't like her and was always knocking her on the job and wanted somebody else in her place (R. 763). Mrs. Thomas was fifty-seven years old, had grandchilren, and she stated that Mrs. Vondrake tried to keep her at home and put some younger person in her place (R. 763). She felt that Mr. Shauf had the interest of other people working in the factory more at heart than her interest; that prior to any union activities in the old mill she had been discriminated against in favor of Lois Shirley, who first worked in the factory in 1912 (R. 764-765).

Mrs. Thomas' own testimony completely supports Shauf's conclusion that she would not make a desirable employee for the new company.

GEORGE A. STUBBS.

The application of George Stubbs was declined, according to Shauf, because of his uncontrollable temper. Shauf supports this statement with the fact that Stubbs, while working for the Mill, had had a serious physical

difficulty with an employee named Chester Harris and that on that occasion he told both of them they should be fired but let them remain on the condition that they would do their work properly. After that Stubbs didn't have any more fights but he didn't get along very well (R. 417-418).

Parks testified that within the last eighteen months materials had been stolen from the bakery and Stubbs was suspected of having stolen them (R. 547). He further testified that at the time of the fight between Stubbs and Harris the consensus of opinion was that Stubbs was the aggressor (R. 547-548). Stubbs admitted having the fight in the plant with Harris and according to his version he first complained to the foreman that Harris was interfering with his work by keeping certain oven doors open and the foreman instructed Stubbs to tell him to close the bottom doors but Stubbs retorted to the foreman "no, that is not any of my business." The foreman then gave the instructions and Harris accused Stubbs of hollering at him, and one word brought on another with the result that Harris threw an eighteen pound crank at him from a distance of twelve feet and hit him in the head (R. 676-677). Stubbs was seriously injured and was carried to a doctor, and told Harris that he didn't want it to happen any more as it might cause trouble (R. 678). Notwithstanding his version of the origin of the fight, Stubbs testified:

> "A. I was criticized a great deal in regard to the fight, yes, sir.
> Q. When did that happen?
> A. There has been several of them, first one and then the other criticized me about the fight."
> (R. 680).

He further testified that a number of employees criticized him about the fight and the admission is clear that the employees considered Stubbs to blame for the fight.

It is clear that Stubbs's application was rejected because of this fight and his own testimony shows that he had an ungovernable temper and that the employees generally placed the blame for the fight on him rather than on Harris, so that the employment committee was justified in considering him an undesirable applicant even though the fight had occurred about three years before the date of his application.

CATHERINE KELLEY.

Catherine Kelley was not selected as an employee, as testified by Shauf, because of the state of her health, which brought continuous complaints about working conditions. The building was either too hot or too cold; she wanted the fan running when it was off and wanted it off when it was running. Most of the complaints were voiced through her husband, who was working in the bakery (R. 420). She continually wanted something that could not be afforded to every employee. Upon the slightest injury she would be off from work for weeks (R. 421). Mrs. Kelley testified in her own behalf. She admitted that on one occasion she had been off for seven weeks in 1937. On a previous occasion she had been confined to the hospital (R. 899). On another occasion in 1936 she hurt her foot and had to work sitting down (R. 901). The time she was confined to the hospital was occasioned by a fall (R. 902). She admitted that she had complained about the fans (R. 902). Her husband had gotten another employee to bring her a special fan (R. 904).

On cross examination she admitted that she had seen Dr. Bibb, a heart specialist, frequently some weeks twice and some weeks once, for a period of seven weeks in 1937 when she was suffering with low blood pressure (R. 707). After returning to work she continued to go to see Dr. Bibb during the rest of the year from once to twice a week (R. 908).

The applicant's own testimony completely supports the reason assigned for her rejection.

WILLIAM SELLERS.

Shauf testified that William Sellers owned a farm in Middle Tennessee and was continually talking of going back to the farm. He got off from work quite often to go to this farm and sometimes he would say that he didn't know whether he could come back or not. This had occurred during the summer in which he put his application for employment by respondent. Shauf testified that for this reason he decided Sellers would not be a desirable employee for respondent. *Sellers did not testify and Shauf's testimony is wholly uncontradicted.*

The record shows that Sellers was not a member of the union. Nevertheless, the Board found as a fact that Shauf's testimony, though undisputed, was untrue and that the reason for not employing Sellers was his union membership though the record showed that he was not a member of the union. The only means by which the Board sought to justify this clear misstatement of the facts was the statement contained in its finding that during the oral argument before the Board in Washington, long after the proof had been taken, the attorney for the respondent made the general statement that all of the rejected applicants were members of the union. This oral argument is not in the record and if such a statement was made it was wholly inadvertent and clearly not substantiated by anything in the record. Counsel for respondent has no recollection of making any such general statement but even assuming that it was made in the argument it is difficult to understand how any unbiased judicial tribunal would undertake to base a finding of fact, which it must have known was erroneous, upon a general statement made during the oral argument and which is not a part of the record in the case. Counsel for the Board, in the brief filed in this cause, concedes that William Sellers' name does not appear on the union list (See Footnote 9, R. 24).

Shauf testified that Cordell did not manage his machinery properly, with the result that he would make "scrap." Shauf called the foreman's attention to this and when the foreman undertook to criticize Cordell he would frown and indicate his dislike in taking orders about the matter. He had been reprimanded by the foreman in Shauf's presence about such matters less than a year before he applied for employment with respondent. This employee was uneducated and couldn't do any work that required any knowledge of keeping a record of cases and on one occasion he had been removed from a job that required such records because he wasn't competent to do the work (R. 423). Shauf also testified that he was slow to learn and for these reasons his application was rejected.

Cordell testified that he could read and write a little. He was unable to fill out his application and had his brother do it (R. 781). He admitted he had had a disagreement with his foreman about making scrap and the foreman had complained that he along with some others was making too much scrap (R. 782).

On cross examination this witness was asked and answered as follows:

"Q. What day of the month?

A. Well, I don't know. Do you think I am plumb ignorant?

Q. Did I understand you to say you don't know what day of the month this is?

A. That is right.

Q. Well, *what month is this?*

A. What—what month?

Q. Yes, sir.

A. *I don't know exactly what month it is.*"

(R. 790.)

This testimony was given in the month of December, just a few days before Christmas. Cordell at that time

was unable to state what day of the month it was or even what month it was. There was no evidence that he was ever active in the union, yet the Board concluded that his application was not rejected upon the grounds of his inability to learn or his practice of operating his machinery and making scrap, but was due to the fact that he was a union member. Such conclusion is wholly without any support in the evidence.

THORA MAE HEATON.

Thora Mae Heaton was a Seventh Day Adventist and because of her religion would not work on Saturday. Shauf testified that he admired her for adhering to her religion but that her refusal to work on Saturday when the bakery was in operation worked a hardship on other employees and made her employment unsatisfactory (R. 424). Mrs. Heaton in her testimony confirmed the fact that she was a Seventh Day Adventist and that she had declined to work on Saturday (R. 687). This situation first arose in 1938 while she was working for the Mill Company. She said that Mr. Bean, an officer of the Mill Company, praised her highly for being a Seventh Day Adventist but stated that since she had joined the union she would have to abide by the rules. He called her attention to the fact that they had previously had a Seventh Day Adventist who worked for them and they had had to let her go because she could not work on Saturday (R. 688-689). She complained to the grievance committee of the union and the Mill Company made an exception in her case (R. 691).

While it is true that the Mill Company made an exception in favor of Mrs. Heaton it is manifestly clear that this exception worked a hardship which the respondent was required to take into consideration and which justified its failure to employ Mrs. Heaton although it was no reflection upon her ability or her religion. The respondent was not required to make an exception in favor of Mrs. Heaton just because the Mill Company had, and its

failure so to do was not a discrimination against her on account of her union membership.

STELLA PATTY.

Parks and Shauf were of the opinion that Stella Patty's interest in her work had declined and they also felt that she appeared to be a compensation hazard. Shauf testified that the forelady had complained of her lack of interest on several occasions and he had instructed the forelady to talk to her about it (R. 425-426).

Testifying in her own behalf, Stella Patty admitted that during the year 1937 she was under treatment of a doctor for cancer and that this treatment continued an entire year (R. 737). She admitted that on lots of days she complained of feeling bad but while she made these complaints she worked every day (R. 738).

On cross examination she admitted that she was suffering from an internal cancer (R. 740). It was but natural that a person suffering from an internal cancer would continue to lose interest in her work and would complain of her suffering while working and she would also be a compensation hazard.

While this condition was unfortunate and was no reflection upon the applicant it, of course, constituted ample grounds for the rejection of her application.

LOIS BAKER.

Shauf testified that he voted not to employ Lois Baker because in his opinion she had become very much dissatisfied with her work. Parks wrote on her application that she was "fussy" and had threatened violence to other employees (R. 427). Shauf supported his opinion by testifying that he received a letter from some one to whom she was applying for employment so that he knew she was endeavoring to obtain another job (R. 427).

Lois Baker testified that a Mr. Bean, who was an officer of the Mill Company but who had no connection with respondent, on an occasion more than a year before

she applied to respondent for work had indicated in a conversation with her that he had no use for the union. She also testified that while working for the Mill Company she had complained to Shauf about the question of seniority of six girls in the pie department and that Shauf had worked the matter out fairly and without discrimination and had stated that while they were under the union contract he would do the best he could with it but that when the year was up the Company would try to work out something for its own benefit (R. 608-609). The Mill Company went out of business before the year was up and the contract expired by its own terms. In the same connection Shauf stated to her while they were both working for the Mill Company that he didn't understand why the men joined the union just to get insurance when the company could give them such better insurance at a cheaper rate, and complained that the employees had walked out and struck too quickly and left so much dough on hand and that it would have been much better for all of them if they had not acted so hastily. All of this occurred long before respondent's organization and while Lois Baker was working for the Mill Company (R. 609).

This applicant admitted the truth of Shauf's testimony to the effect that she had made application for work at another place and had talked with Shauf about giving her a reference and that he had agreed to do so. She made this application because she was dissatisfied as the bakery was only operating on part time (R. 610). This witness admitted that she had had "several arguments" with other employees but she stated they were not "heated" arguments. She admitted that she had had more than one argument with a fellow employee named Nell Murphy and that these arguments continued from time to time (R. 611-612).

On cross examination this applicant admitted that on the question of seniority in the pie department Shauf had decided that she should work in that department every

third day but that her fellow union members objected to this as a discrimination in her favor and Shauf finally made arrangements upon the complaint of her fellow union employees which left her out of this preferential employment (R. 619). She testified that after telling Shauf that she was seeking other employment and asked for his recommendation she was successful and got a job at McClellan's but worked there only about ten days during the Christmas rush (R. 620). She admitted that while she had had numerous arguments with Mrs. Murphy, a fellow employee, she could not remember how they started, and that Mrs. Murphy had finally complained to Shauf, and thereupon the witness Lois Baker characterized Mrs. Murphy as a "stool pigeon" (R. 620). She knew that she had been reported to Shauf on numerous occasions for starting arguments and she made no effort to correct any false impression that Mrs. Murphy might have given to Shauf (R. 621).

Her record of almost continuous arguments with employees and her knowledge that she was being reported to Shauf and represented as being fussy and a trouble maker and her own admission that she made no effort to correct this impression which she knew was being given to Shauf clearly disclose that Shauf's failure to approve her application was based upon what he honestly thought to be her disposition and upon the further admitted fact that he knew she had been seeking employment elsewhere. Whether or not Shauf's appraisal of her disposition was correct is not material since it is clear that his rejection of her application was not based upon her union membership.

KATE P. BROWN.

The reason for this applicant's rejection was established beyond dispute and the factual basis upon which it rested was admitted by her. Because of her failure to pay her bills, judgments were rendered against her and her wages were continually garnisheed. About six months

before she applied for work with the respondent she had appealed to Shauf to help her and Shauf had talked with a man who had garnisheed her wages and had gotten him to withdraw the garnishment. Under the rules made under the union contract with the Mill Company employees whose wages were garnisheed were subject to discharge.

Parks wrote on the back of her application that she had too many garnishments and that customers had threatened to quit trading with the bakery unless it forced Mrs. Brown to pay her debts (R. 428-429).

Mrs. Brown admitted that she had been garnisheed in January, 1939, and again in March, 1939, just shortly before she made application to respondent for employment (R. 805). She then had another garnishment served against her wages in April, 1939. She stated that Shauf on each occasion befriended her all that he could and was as nice to her "as you could expect anybody to be" (R. 806). One of the garnishments was from M. Solomon grocery. She admitted that she owed him an unpaid grocery bill and that a deputy sheriff served the papers on her in the bakery (R. 809). She admitted that she understood that under the union contract with the Mill she was subject to dismissal if two garnishments were run against her wages within a period of sixty days. She admitted being sued and garnisheed by a Mrs. Hedges, who obtained a judgment against her. She testified that the garnishment that was run against her wages in April was for back rent which she owed to a Mr. Brown (R. 811). She admitted having her wages garnisheed in the year 1938 and she would not deny having her wages garnisheed in 1937 (R. 812).

Mrs. Brown's own testimony amply supports the reasons given by Shauf and Parks for the rejection of her application. The Court will observe that the Labor Board found all of these facts to be true substantially as hereinabove set out. There was no evidence of any particular union activity by Mrs. Brown. Notwithstanding these

undisputed facts the Board concluded that Mrs. Brown was not employed solely because of her union activities and union membership.

GEORGE W. MOODY.

Shauf testified that while they were working for the Mill Company a number of favors had been extended Moody but he had been found to be very unappreciative and he felt he would not make a suitable employee of the new company. He had been sent to the hospital and helped out on several different occasions but he didn't seem to appreciate this help, nor did he take any interest in his work. He failed to keep up his end of the work and had been reprimanded by the foreman on several different occasions (R. 430).

Parks assigned as his reason for rejection on the back of Moody's application that the Mill Company had been given a confidential report by a specialist showing that this applicant was affected by syphilis (R. 461-462). This matter was discussed by the employment committee on July 1st, and while the report which had been given was confidential and while the specialist was not sure, he had confidentially advised the company that he suspected Moody of having the disease indicated. This information came from Dr. Willard Steele, an eye, ear, nose and throat specialist, to whom Moody had been sent by the Mill Company when he complained of having a sore throat (R. 463). Moody, however, was permitted to continue to work for the Mill Company because the doctor was not certain of his diagnosis. On this particular occasion Moody was off from work and was sick and when he couldn't get any medicine that would do him any good Shauf sent him to Dr. Steele. Steele gave Shauf the confidential information about his suspicions as to Moody's trouble over the telephone (R. 468-469).

Moody had been examined by the City Health authorities and had been approved for work in a bakery and Shauf testified that he permitted him to continue

working in the mill because Dr. Steele told him that he could not be sure of his diagnosis (R. 471).

Moody was called by the Board as a witness and admitted that on the occasion mentioned by Shauf he was off from work some four to six weeks and that something seemed to be the matter with his head. At the hearing Moody presented a certificate showing that a Wassermann test made on him in August, 1939, was negative. He further testified, however, that at the time mentioned by Shauf he was in the Baroness Erlanger Hospital, and he presented a certificate from this hospital which showed that *three* Wassermann tests were made while he was at the hospital, two of which were reported negative with no report indicated from the other. This certificate also showed that after taking three blood Wassermann tests the hospital made *three* Wassermann tests on his spinal fluid, one of which was reported negative with no report on the other two (R. 976). *The very fact that the hospital, after making three Wassermann tests on his blood, saw fit to go further and make three Wassermann tests on his spinal fluid was a clear indication of suspected syphilis and clearly substantiated the report which the evidence shows without dispute was given to Shauf over the telephone by Dr. Steele.*

Furthermore, Moody admitted on cross examination that while he was at the hospital his spine was tapped and that he was not treated for any particular disease at the hospital (R. 700). This tapping of his spine occurred after they had given him a previous blood test (R. 701).

It is that this proof does not definitely establish the fact that Moody was suffering from the disease indicated, but it does definitely establish that numerous recurring tests were made while he was in the hospital for the purpose of ascertaining whether or not he did have the disease—clearly indicating the suspicion of its presence. It is submitted that the suspicion of the presence of this particular disease afforded ample factual basis for the rejection of his application to work in the bakery in the handling of food for human consumption.

Shauf testified that he rejected this man's application because he had been very neglectful of his duties, did not take the interest in his work that he should and failed to get out the required production. His foreman had talked to him about speeding up the machines and getting out the dough. In addition to this it had been reported to him by Luther Phillips, the president of the union, that Kelley had stated that he would not work at the bakery if he could get a job anywhere else (R. 437).

The reason assigned by Parks was that he was afraid of personal violence from this applicant, with the additional reason that he had declined to improve his personal appearance by shaving at least every other day. Parks reported to the committee that he had insisted on Kelley changing his clothes more often and trying to look cleaner and keeping a cleaner appearance (R. 438). The substance of Parks's testimony was that Kelley had come to his office three or four months before he made application to the respondent and wanted to know why he was not getting along any better than he was. Parks told him that he should pay more attention to his personal appearance and shave at least every other day and change his clothes more often and look as though he was employed in a bakery. Kelley did not take this criticism very kindly and appeared to be displeased and left the office abruptly with a threatening look (R. 550-551). Later he improved his personal appearance some but he continued to act as if he might do personal violence to Parks (R. 552). Parks admitted that he did not discharge Kelley but stated that when confronted with the question of whether or not he would recommend his employment for a new company he felt it was unadvisable because of the reasons stated.

Kelley testified that he was fifty years of age and had been employed in the old bakery for many years. He denied having any such conversation as detailed by Parks and testified that on several occasions he had made loans

to Parks and was friendly with him. He stated that he shaved about twice a week. He admitted that he had been unable to handle the work assigned to him on one or two occasions in June just before he made application to the respondent (R. 647).

This witness' testimony illustrates the general method of procedure adopted by the Board in producing evidence in support of its charges at the trial. The Board first offered Parks as the Board's witness and, under questioning by the Board's attorney, Parks testified that Kelley was unclean and unsanitary and would not improve his personal appearance. Thereupon the Board offered Kelley as a witness and he testified that the evidence given by the Board's first witness was not true. In this situation the Board concluded that the reason for the rejection of Kelley's application was his union membership, resting its conclusion on the fact that the Board's first witness had assigned a number of reasons which had been denied by the Board's second witness. Assuming that the Board had the right to contradict its own previous witness, the greatest legal effect that can be claimed is that Kelley's testimony obliterated Parks's testimony, leaving no testimony in the record as to why Kelley was not employed except for the vague surmises and conjectures.

MATTIE DAVIS.

In her application to respondent Mattie Davis gave her age as fifty-six years. Shauf testified that she had a peculiar disposition, was hard to control, hard to get along with and resented any criticism from her foreman, and that the foreman had reported these facts to him (R. 433).

Parks voted against the employment of Mrs. Davis because of her age, after a discussion of this factor by the committee (R. 433). Both Shauf and Parks testified that these were the reasons for the rejection of her application. They were amply confirmed and supported by the testimony given by Mrs. Davis herself. Although she

had shown her age on the application as fifty-six, she testified that she was in fact sixty years of age (R. 745). She had been in the same department about thirty-five years. She testified that she had had some arguments with employees which she termed "little disputes," but no heated arguments (R. 748). She produced a certificate showing that she had been examined by a doctor on August 7, 1939, and found to be in good physical condition and able to work (R. 978). She testified on cross examination that in putting her age down as fifty-six years she was mistaken and that she had made this mistake by looking in the Bible and had gotten her sister's or her brother's age by mistake. She had only found her correct age the night before she testified on the witness stand.

There was no evidence of any union activity by Mrs. Davis. She was admittedly an old woman and four years older than than she had stated herself to be in her application. Her application was rejected because of her age and there was not the slightest suggestion of any discrimination against her on account of union activity.

FRANCES D. BRIDGE.

Shauf testified that Mrs. Bridge had been employed by the Mill on a full time basis about thirty days before it closed. Prior to this time she had been working part time for the Mill and working elsewhere at night but had agreed to abandon the night work if the Mill would give her a full time job. After giving her the full time job he had learned that she had continued to work elsewhere at night. He stated that he declined to hire her on behalf of the respondent because he understood that she was working elsewhere at night and that it was impossible for her to hold two jobs at one time (R. 434-435). Phillips, who was president of the union, had complained that this night work was interfering with Mrs. Bridge's work in the bakery (R. 436).

The truth of this testimony was admitted by Frances Bridge when she was called as a witness by the Board.

She further admitted that Mr. Shauf had talked to her in June, 1939, and she had told him that she was working as a waitress at a night club and she had agreed to quit her work at the night club if she was given a regular job at the bakery. She admitted that she had worked on a regular job in the bakery for two weeks before the Mill closed and that she had not quit her job at the night club because she knew the Mill was going to close and she was not sure whether she would be employed by the new company (R. 728).

It appears from her own testimony that at the time her application was rejected she was working at the night club and therefore the reason assigned by Shauf for not accepting her application was proven to be true as a matter of fact and was, indeed, admitted by Frances Bridge.

M. G. MILAM, JR.

The rejection of Milam's application for reasons having no connection with union membership or union activities was established by the undisputed testimony, including that offered by Milam himself.

Shauf testified that he disapproved the application because on a number of occasions when Milam was working for the Mill Company he had been caught slowing down the machinery and that such incidents had happened several times during the last year and he had been reprimanded for it by his foreman (R. 431). Furthermore, it had been the custom at the plant for the cake or the cracker crew to double over or work in each other's department where one department was behind with production. Milam, who worked with the cake crew, objected to the cracker crew making up cake production that was behind and claimed that the cake demand should be allowed to wait until the cake crew could catch up production. He became insubordinate and on bad terms with his foreman when the foreman caught Milam slowing down the machinery (R. 431-432).

Shauf further testified that Milam had tried to get him to hire his wife, but he called his attention to the

fact that he could not hire married women under the union contract. Milam thereupon attempted to discuss union matters with him but Shauf told him that he could not do so and further told him that he would try to get his wife a job elsewhere (R. 891).

Milam was called as a witness by the Board and stated that he had worked in the bakery for the old Mill Company for two years between 1925 and 1927. After remaining away for ten years he had been reemployed in January, 1937, and continued to work until the Mill closed in June, 1939. Milam admitted that he had objected to the cracker crew doubling over to make up a deficiency in cake production, his objection being made between April 15 and June 10, 1939. At that time Mrs. Sutton, Phillips and Milam, composing the grievance committee, met with Shauf and discussed the matter and Shauf declined to settle the matter in a way suggested by Milam but afterwards agreed that Milam's position was correct under the existing contract, which provided for seniority by departments. He admitted that he had slowed down the machines and claimed that he had the right to do so and he claimed that it was necessary for him to slow down the machines because of the lack of heat in order that the cakes would bake (R. 482-486).

Milam further testified that he undertook to get Shauf to employ his wife by representing that she was not a member of the union and that he further (apparently voluntarily) stated that he would drop out of the union "because I don't want to work in a house undivided," but that Shauf failed to hire his wife and also declined to approve his application on behalf of respondent (R. 494-495).

It will be seen that among the other reasons assigned on the back of Milam's application for its rejection (Exhibit 12 "Y") was the statement that it was common talk in the plant that his relations with a young lady employee were such as not to be a good recommendation for employment with the respondent company (R. 495).

Milam admitted that in 1927 he had left the employment of the old bakery because of improper relations with one of the female employees and that when he asked for reemployment in 1937 Shauf had told him that the girl was still working there and that he hoped that his return to work would not cause any trouble (R. 496). Milam testified voluntarily that when he returned to work in 1937 the men employees began to talk about it and as many as two or three mentioned it to him as an objection to his reemployment but that he stated to them, "now listen, I have come in this shop and I do not here intend to have such as that throwed in my face." He accused a son of foreman Venable as being just as guilty as he was and stated that thereupon Venable made no further question about his reemployment (R. 496).

On cross examination Milam admitted that the girl with whom he had had the affair had been employed by respondent. Milam further admitted that on being accused in connection with the girl in 1927 he left Chattanooga and remained away in various cities for a period of ten years (R. 501). He testified that before returning to work in the bakery in 1937 he asked Shauf if it was all right for him to go back and that he meant by this that he was apprehensive of trouble resulting from his return. He admitted that Shauf was apprehensive of danger and told him at the time he gave him the job, "I don't know the outcome of this and I hope everything will become okeh." Milam replied that if his return caused any trouble he would leave the bakery. He admitted that immediately upon his reemployment some of the men employees objected to his presence as being offensive (R. 503-504). This objection was particularly voiced by a Mr. Adams, who was a married man with a family and who was afterwards elected president of the union. *Milam expressly admitted that he retained his job in spite of this criticism by threatening foreman Venable with the exposure of his own son in connection with the affair* (R. 505).

Furthermore, Milam admitted the controversy in which he objected to the idle cracker crew working to make up a lack of production in cakes after the cake crew had worked eight hours, and admitted that he insisted that the cracker crew should remain idle and out of work even though the cake crew was behind in production after a full eight hour day's work (R. 507-509). He stated that Shauf told him that the bakery was badly in need of cakes but that he and the committee felt that the bakery didn't need the cakes (R. 509).

With respect to Milam's efforts to get Shauf to employ his wife, Milam admitted that under the existing union contract any vacancy caused by the discharge of a union member had to be filled by an applicant who would join the union and that it was perfectly proper for Shauf to ask him how his wife felt about joining the union where she was seeking employment in a vacancy caused by the termination of the employment of a union member. *He told Shauf that his wife was antagonistic to the union and Shauf never employed his wife to work* (R. 512-513).

It was after Milam had retained his employment over foreman Venable's objection by threatening to expose Venable's son that the incidents occurred in which Milam deliberately slowed down the machinery. He admitted that it was foreman Venable's job to regulate the speed of the machinery and he admitted that Venable had had more experience in operating the machinery than he had (R. 516-517).

Milam reiterated his former testimony that in the early part of 1939 he told Shauf that he would not work in a plant that was part union and part non-union and that when the contract ran out he was going to get out of the union (R. 519). Notwithstanding this statement Shauf declined to approve his application for employment by respondent, thereby clearly indicating that the reason for the rejection had no connection with union affiliation.

It is eminently clear from Milam's own testimony that his personal conduct and improper relations with a female employee during his prior employment followed by his admitted blackmailing of the foreman into withdrawing his objections to his return to the bakery, and by his complete assumption of the foreman's authority in slowing down machinery and thereby restricting production, amply justified the employment committee in rejecting his application.

Conclusion.

Petitioner realizes that this Court must and will deny the writ of certiorari to review the usual decision of the United States Circuit Court of Appeals where the latter court has found substantial evidence to support the conclusions of the National Labor Relations Board. It is earnestly insisted that the decision of the Sixth Circuit in the present case is so clearly erroneous and involves such new and startling departures from accepted practice and established judicial principles of a fundamental nature that this Court is eminently justified in taking jurisdiction for the purpose of reviewing the decision.

Respectfully submitted,

CECIL SIMS,
Attorney for Petitioner.

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Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 414

CHATTANOOGA BAKERY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 986–992) is reported at 127 F. (d) 201. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 17–94) are reported at 25 N. L. R. B. 397.

JURISDICTION

The decree of the court below was entered on April 15, 1942 (R. 985). A petition for rehearing filed by petitioner was denied on June 29, 1942 (R. 993–1001). The petition for a writ of certiorari was filed on September 23, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the

Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether the Board's findings that petitioner engaged in unfair labor practices in violation of Section 8 (1) and (3) of the Act by refusing to hire 27 employees[1] of its predecessor company, and refusing to reinstate 15 employees after a strike, are supported by substantial evidence.

The remaining questions urged by petitioner but which we think are not presented are:

2. Whether petitioner was responsible for the activities of a predecessor company.

3. Whether the Board improperly impeached its own witnesses.

4. Whether a strike of petitioner's employees resulting from petitioner's unfair labor practices was a "labor dispute" within the meaning of Section 2 (9) of the Act so that the strikers remained "employees."

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set out in the Appendix.

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[1] The Board found (R. 75) that petitioner had discriminatorily refused to hire 27 employees of a predecessor company; the court below sustained the Board's findings as to 26, but remanded the cause to the Board as to the remaining employee for the taking of further testimony since it was doubtful whether he had been a member of the Union (R. 992). Hereinafter, we shall refer to the group as 27 employees.

STATEMENT

Upon the usual proceedings, the Board issued its findings of fact, conclusions of law, and order (R. 17–94). The facts, as found by the Board and as shown by the evidence, may be summarized as follows:[2]

On various occasions between May 1938, when the Union[3] began to organize its employees, and June 30, 1939, when it sold its wholesale bakery business to petitioner, officials of petitioner's predecessor company, Mountain City Mill Company (herein called the Mill Company) expressed hostility to the Union and threatened reprisals against its members (R. 22–26, 68–69; R. 273, 286, 606–607, 663–664, 804–805, 847). Superintendent Shauf, in particular, evidenced his animosity toward the Union. He threatened to "get rid of this union * * * one way or the other" (R. 27, 69; R. 494); expressed a similar intention on another occasion (R. 26, 69; R. 608–609); made specific inquiry whether an applicant for employment was pro-Union or anti-Union (R. 27, 69; R. 493–494); and expressly refused to employ another applicant because of his Union sympathies (R. 28, 69; R. 650).

[2] In the following statement, the references preceding the semicolons are to the Board's findings, and the succeeding references are to the supporting evidence.

[3] Bakery and Confectionery Workers' International Union of America, Local No. 25.

On June 30, 1939, petitioner [4] acquired the business (R. 21, 32–33; R. 226–227, 313–315, 379, 960–966). It retained the entire Mill Company supervisory staff and the office and sales personnel (R. 36, 66–67; R. 967, 971, 528–529). It followed a different course, however, with respect to the production employees, whom the Union had sought to organize. The Mill Company had in its employ 107 nonsupervisory production employees; 55 or 56 of these were members of Union, and the remaining 51 or 52 were not (R. 33, 66; R. 302, 238, 954–955, 967–969). Petitioner retained all 51 or 52 of the nonmembers (R. 34, 66; R. 967–971); but it refused to employ 27 of the Union members [5] (R. 34, 66; R. 346–347, 400–401, 967–971, Bd. Exhs. 12a–12bb [6]). Instead it replaced them with new and inexperienced nonunion employees (R. 34, 37, 66, 71; R. 443, 835, 852–860, 967–971).

The 27 Union applicants were considered, and rejected, by a "personnel committee" of which Superintendent Shauf (*supra,* p. 3) was chairman and which petitioner had authorized to decide whom to hire (R. 36–37, 69; R. 316–318, 400, 565).

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[4] Forty-eight percent of petitioner's stock is owned by two men who were the principal stockholders in the Mill Company (R. 36n., 29–30; R. 232–233, 946). One of them is president of petitioner (R. 35, 36; R. 227, 350).

[5] See note 1, p. 2, *supra.*

[6] In accordance with a stipulation in the court below, printing of these exhibits was omitted. The original exhibits are part of the transcript of record on file with the Clerk of this Court.

Admittedly, Shauf had in his possession a list of the Union members (R. 37, 71; R. 396, 400) and his recommendations for rejection were accepted in every case by the other Committee members and by petitioner (R. 37, 69, 71; R. 869, 347–348, 399–400, 530–531).

In each case petitioner asserted some failing in the rejected employee; for example, it assigned as causes a "peculiar disposition" (R. 38; Bd. Exh. 12a), a "loss of interest" (R. 39; Bd. Exh. 12b), "dissatisfaction" (R. 41; Bd. Exh. 12c), "talking about things that should not be discussed in the plant" (R. 45; Bd. Exh. 12g), "did not fit into the new company" (R. 43, 46, 49, 50; Bd. Exhs. 12e, 12d, 12m, 12w), and lack of "educational background" (R. 54; Bd. Exh. 12q, R. 565). The Board carefully reviewed the alleged disqualifications of the rejected applicants and concluded that the reasons assigned were not the motivating causes of the refusals to hire them (R. 38–66); it found that the true cause was petitioner's desire to destroy the Union's majority status and to discourage membership in the Union (R. 66–75).

The Board did not overlook the fact that petitioner had hired certain of the Union members, including the Union president, Phillips, and its secretary, Sutton (R. 67–68). But Phillips, because he feared, correctly, that many of the members would not get back their jobs, had urged that the Union be disbanded and that it "cooperate with

[petitioner's president] in anything that he wants done" (R. 31–32; R. 492, 628–629, 658). Sutton had threatened to cause trouble in the event of discrimination (R. 68; R. 630).

Petitioner was as hostile to the Union as the Mill Company had been. A foreman told a Union member that she would have to "choose" between "working with [petitioner]" and "being on the outside with the rest" (R. 34, 69; R. 732–733). Another supervisor asked a member who had been retained whether she "wasn't sorry" she had joined the Union (R. 34, 69; R. 832). Petitioner's president urged employees to discuss grievances with him individually (R. 35, 69; R. 832–833, 839–840).

On July 14, the Union called a strike in protest against the petitioner's failure to rehire the Union members (R. 75–76; R. 268–270). Fifteen of petitioner's employees joined the strike (R. 77; R. 306–307, 636, 661, 835, 838, 844–845). The strike proved unsuccessful; it lasted until October 25, when application for reinstatement of the strikers was made and refused (R. 76–77; R. 295–298, 958). The Board rejected petitioner's contention that the strikers had "quit" their employment (R. 77–80; R. 297, 309–310, 662, 958–959). It found that the strike was caused by petitioner's unfair labor practices and that therefore petitioner's failure to reinstate the strikers upon demand constituted discrimination in violation of Section 8 (3) (R.

80–82).[7] Independently of this, the Board found that the cause of petitioner's refusal to reinstate the strikers was its desire to discourage Union membership (R. 82–83).[8]

The Board concluded that petitioner refused to hire the 27 employees of the Mill Company and refused to reinstate the 15 striking employees because of their Union activities, in violation of Section 8 (3) of the Act (R. 75, 83, 88); and that by these refusals and by its antiunion statements (*supra*, p. 6) petitioner also violated Section 8 (1) (R. 75, 83, 88–89). The Board ordered petitioner to cease and desist from its unfair labor practices, to reinstate with back pay the employees against whom it had discriminated, and to post appropriate notices (R. 89–91).

On June 11, 1941, the Board petitioned the court below for enforcement of its order (R. 1–8). By its opinion and decree of April 15, 1942, the court enforced the Board's order in full except that it omitted a "work-relief" provision at the request of the Board, and remanded the couse in respect to one employee for further evidence concerning his

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[7] The authorities uniformly so hold. See, for example, the cases cited at R. 81, note 88.

[8] The Board pointed out that some other employees who had joined and then deserted the strike were taken back; that a member who was expelled from the Union was also taken back; and that some of the strikers who individually applied after the strike ended were rejected when, in response to petitioner's question, they reaffirmed their loyalty to the Union (R. 76–77, 82–83; R. 308, 310, 634–635, 872–873).

Union membership (R. 985–992). Petitioner's petition for rehearing was denied on June 29, 1942 (R. 993–1001).

ARGUMENT

1. Petitioner's principal contention (Pet. 14, 16–35, 38–69) is that the findings of discrimination with respect to the 27 Union applicants are without support in the evidence. The contention presents no question of general importance. Moreover, it is unsound. The refusal to hire almost half the Union employees while retaining all the non-Union employees,[9] the trivial reasons assigned in nearly all cases, the contemporaneous hiring of new and inexperienced non-Union workers, and the hostility of Superintendent Shauf toward the Union supply an adequate basis for the Board's conclusion. The Shauf committee was a "dam to self-organization at the source of supply" (*Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 185).

2. Petitioner states (Pet. 14, 21–23) that the Board held petitioner to be responsible for the ac-

[9] Compare *F. W. Woolworth Co.* v. *National Labor Relations Board*, 121 F. (2d) 658, 661–662 (C. C. A. 2); *National Labor Relations Board* v. *Bachelder*, 120 F. (2d) 574, 578 (C. C. A. 7), certiorari denied, 314 U. S. 647; *Montgomery Ward & Co.* v. *National Labor Relations Board*, 107 F. (2d) 555, 559 (C. C. A. 7); *Hamilton-Brown Shoe Co.* v. *National Labor Relations Board*, 104 F. (2d) 49, 53 (C. C. A. 8); *North Whittier Heights Citrus Assn.* v. *National Labor Relations Board*, 109 F. (2d) 76, 78–79 (C. C. A. 9), certiorari denied, 310 U. S. 632.

tivities of its predecessor, the Mill Company, and contends that this was error. But petitioner misinterprets the action of the Board. Each company was held responsible only for its own unfair labor practices, and the Board entered a separate order against the Mill Company based on the conduct in which it had engaged (R. 84, 91–92).[10] Insofar as that conduct also showed that Superintendent Shauf and other supervisors whom petitioner engaged were hostile to the Union, it was of course relevant to the issues in the present proceeding.

3. Petitioner contends (Pet. 14–15, 30–35) that it was error for the Board to "impeach" its "own witnesses." The witnesses to whom petitioner refers were officials and stockholders of petitioner (Pet. 30, R. 946), and the alleged "impeachment" consisted of calling witnesses who gave testimony conflicting with the testimony of the officers and stockholders. The short answer to the contention is that Section 10 (b) of the Act provides that "the rules of evidence prevailing in courts of law or equity shall not be controlling." Moreover, even in such courts, it is common practice to allow a party to call an adverse party and its agents without holding the party calling them bound by their

[10] The Mill Company consented to a decree enforcing the separate order against it before the present enforcement proceeding against petitioner was begun; consequently that order is not in issue here.

evidence. *E. g. Dravo* v. *Fabel,* 132 U. S. 487, 490; and see quotation at Pet. 31.[11]

4. Finally, petitioner contends (Pet. 13–14, 15, 35–38) that the Board's order with respect to the 15 strikers is improper. It argues that the refusal to hire the 27 Union applicants was not a "labor dispute" under Section 2 (9) (*infra,* p. 12), and that therefore the 15 strikers did not retain their "employee" status under Section 2 (3) (*infra,* p. 12) when they struck because of such refusal. The contention has no merit. The strike was plainly a "controversy concerning terms, tenure, or conditions of employment" within the meaning of Section 2 (9), for the strikers as Union members sought to protect themselves against the threat of discrimination implicit in the refusal to hire their fellow members among the former employees of the Mill Company. Cf. *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U. S. 177, 185.[12] But even if the strike was not a "labor dispute," the strikers remained "employees" within Section 2 (3) because they ceased work as a result

[11] Even "impeachment" of an adverse party, in the strict sense, is expressly allowed by the Rules of Civil Procedure (1938, Rule 43 (b)) and by the modern rule in most states. 3 Wigmore on Evidence (3rd ed.), sec. 916; see American Law Institute, Code of Evidence, Proposed Final Draft, Rule 106.

[12] Even if the dispute be regarded solely as one between petitioner and the rejected applicants, it was nevertheless a "labor dispute" within Section 2 (9) for that section applies "regardless of whether the disputants stand in the proximate relation of employer and employee."

of petitioner's "unfair labor practice" in rejecting the other Union members. Moreover, even if petitioner's assertion that the strikers lost their "employee" status be accepted, a sufficient basis for the order exists in the Board's finding that the refusal to take them back at the end of the strike was discriminatory. *Phelps Dodge Corp.* v. *National Labor Relations Board, supra.*

CONCLUSION

The decision below is correct and presents neither a conflict of decisions nor any question of general importance. The petition should therefore be denied.

Respectfully submitted.

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OCTOBER 1942.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 15 U. S. C., Sec. 151 *et seq.*) are as follows:

SEC. 2. * * *

* * * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

* * * * *

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist

labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

SEC. 10.

* * * * *

(b) * * * In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

* * * * *

(e) * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

(f) * * * the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

U. S. GOVERNMENT PRINTING OFFICE: 1943